89- 1409

NO._____

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1990

STEVEN C. OSTRANDER

Petitioner,

v.

LINDA K. WOOD

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

KENNETH O. EIKENBERRY
Attorney General of Washington

MICHAEL MADDEN
RENE TOMISSER
CAROL A. SMITH*
Assistant Attorneys General

710 Second Avenue, Suite 1155
Seattle, Washington 98104
(206) 464-7352
Counsel for Petitioner

*Counsel of Record

STATE PRINTING PLANT OLYMPIA, WASHINGTON

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QUESTIONS PRESENTED

Where, as a result of the lawful arrest of her companion for driving while intoxicated, respondent was left without transportation late at night in an urban area;

1. Under the Due Process Clause of the Fourteenth Amendment, as interpreted in *DeShaney v. Winnebago County*[1] did a "special relationship" arise which required the state to protect respondent, a competent adult who was not in custody, from attack by a stranger from whom she accepted a ride?

2. What is the required degree of fault which must be shown in order to make out a substantive due process claim against the petitioner - state police officer?

3. For purposes of the qualified immunity defense under 42 U.S.C. § 1983, where there is neither controlling precedent nor a substantial consensus of opinion as to the scope of a constitutional right, was immunity properly denied based on the Court of Appeals' "retrospective prediction" that it would have adopted a divided opinion of another circuit as controlling at the time this case arose?

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[1]*DeShaney v. Winnebago Cty. Soc. Servs. Dept*, ___U.S.___, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989).

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PETITION FOR WRIT OF CERTIORARI

Petitioner Steven C. Ostrander respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The decision of the Court of Appeals for the Ninth Circuit on rehearing is reported at 879 F.2d 583 (1989) and reproduced in the appendix at 1. The original opinion is reported at 851 F.2d 1212 (1988) and reproduced in the appendix at 47. The decision of United States District Court for the Western District of Washington, which was reversed

by the Court of Appeals, is unreported and reproduced in the appendix at 65.

STATEMENT OF JURISDICTION

(i) The decision of the Court of Appeals on rehearing was issued June 27, 1989.

(ii) Petitioner[2] timely moved for rehearing on July 11, 1989 and, on December 6, 1989, the panel issued an order denying rehearing. *See*, appendix 72.

(iii) Jurisdiction is conferred on this Court by 28 U.S.C. § 1254(1) and 28 U.S.C.§ 2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Due Process Clause of the Fourteenth Amendment to the United States Constitution and 42 U.S.C.§ 1983, the pertinent text of which are set forth in the appendix at 73-74.

STATEMENT OF THE CASE

A. Procedure

Respondent Linda K. Wood brought this action under 42 U.S.C. § 1983 against Washington State Trooper Steven C. Ostrander, alleging that Ostrander violated her civil rights by arresting her companion for driving while intoxicated, resulting in her being stranded, without transportation, late at night. She claims she was raped by an unknown man from whom she accepted a ride.

Wood's complaint did not identify a specific constitutional provision which was alleged to have been violated.[3]

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[2]"Petitioner" is Steven Ostrander, a Washington State Patrol officer. Respondent is Linda K. Wood. As respondent did not appeal the district court's dismissal of defendant Neil Moloney, former chief of the Washington State Patrol (879 F.2d 586, n. 1), he is not a party here. There are no other parties.

[3]The complaint alleged only that Trooper Ostrander's conduct was "negligent and outrageous". App. 75.

After substantial discovery, Ostrander moved for summary judgment, arguing that the facts alleged by Wood failed to state a claim under 42 U.S.C.§ 1983 and that he was entitled to qualified immunity. In opposition to Ostrander's motion, Wood argued that she had shown a violation of her "constitutional interest in personal security" as articulated in *Ingraham v. Wright*, 430 U.S. 651 (1976).

B. **Facts**

The undisputed facts, as found by the district court, were that on September 24, 1984 at 2:30 a.m., after a night of drinking, Ms. Wood and her companion, Robert Bell, were driving home in Bell's automobile. Trooper Ostrander stopped their vehicle for driving with headlights on high beam. When he determined that Bell was intoxicated, Ostrander arrested him and placed him in his patrol car. He asked Bell to sign a "waiver of impoundment", which Bell refused to do. Consequently, Trooper Ostrander called for a tow truck to remove the car. App. 65-66.

Trooper Ostrander then returned to the Bell vehicle, asked Ms. Wood to step out of the car, and removed the keys. Ms. Wood claims at this point she asked the officer how she would get home, but that he did not reply, other than to repeat his request to get out of the car. [4] Ms. Wood complied, and thereafter the officer left with Bell in custody. App. 66.

These events occurred in the Parkland area of Pierce County, Washington, which is south of the City of Tacoma and about five miles from Ms. Woods' home. Parkland is adjacent to the Fort Lewis military reservation and McChord Air Force Base. Respondent's vehicle was stopped in a well lighted urban area with a convenience store and a service station a short distance away, both of which were open for business.[5] Parkland is claimed by Wood to have a rate of

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[4]Petitioner disputes this and contends he offered to call friends or family, which offer was refused. However, for purposes of review, petitioner recognizes that Wood's version of events must be accepted.

[5]Respondent denies knowledge of these facts but does not deny their truth or that Trooper Ostrander was aware of them. App. 66.

aggravated crime which is second to the City of Tacoma's in Pierce County. App. 2.

Although Ms. Wood had been drinking, she was not incapacitated. App. 66. She claims she was without funds for a taxi and would not call her parents in such a situation, because they were disabled. However, there is no evidence that this information was communicated to Trooper Ostrander. App. 10. After Trooper Ostrander left, Ms. Wood began walking home. In a short distance, she was offered rides in three or four different vehicles. After initially declining, she finally accepted a ride with the stranger who assaulted her. App. 2.

C. **District Court Decision**

The district court granted summary judgment on qualified immunity grounds, holding that any constitutional right to state protection against criminal acts was not clearly established outside of a custodial setting. It went on to note that even under the "special relationship" doctrine adopted by the Ninth Circuit in 1986, that such a relationship did not exist in this case.[6] App. 70-71.

D. **Court of Appeals Decisions**

The Court of Appeals reversed, in a 2-1 decision. It first decided that Ostrander's conduct could be characterized as "more than mere negligence" and that this was sufficient to

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[6]After discussing the holding in *Escamilla v. City of Santa Ana*, 796 F.2d 266 (9th Cir. 1986), the district judge stated:

> Wood was an adult female, admittedly able to exercise the independent judgment of an ordinary adult. She was left within walking distance of two open businesses where she could seek help. In this case the State had not affirmatively committed itself to protecting this class of persons. The state at the time of the incident had no guidelines requiring the safekeeping of passengers of arrestees. In this case it cannot be said that the state knew of Wood's plight. This is not the type of case where the state had knowledge of a particular madman who was likely to prey on Wood. The plaintiff alleges that this particular area is a high-crime area. To hold that the trooper had a duty of protection on that basis would be to create an affirmative constitutional duty of protection, in essence, to the public as a whole. This court declines to do so.

App 71.

state a claim for violation of Fourteenth Amendment Due Process. It went on to hold, based on *White v. Rochford*, 592 F.2d 381, (7th Cir. 1979), that despite the absence of custodial control over Ms. Wood,the officer had placed her in danger such that he was obligated to protect her from harm. Finally, the court held it was likely that it would have reached these same conclusions in 1984; therefore, it found that Trooper Ostrander was chargeable with knowledge that respondent had a clearly established right to be protected from whatever violence might befall her.

After rehearing, the Court modified its opinion somewhat:[7] first, the court retreated from its position that any level of fault "more than mere negligence" would be actionable, and instead held that the facts tended to show "deliberate indifference". 879 F.2d at 588. However, the court did not articulate a definition of "deliberate indifference", nor did it specify that "deliberate indifference" would be the minimum showing required. Instead, it stated that:

> A jury presented with these facts might find Ostrander's conduct to have been "deliberately indifferent", "reckless", "grossly negligent", or merely "negligent" ...It is thus likely the district court will face the difficult task of defining for the jury the terms "negligence", "gross negligence", "recklessness", and "deliberate indifference".

879 F.2d at 588, n.4 (citations omitted); app. 6[8]

As to the question of duty, the court adhered to its original position, stating:

> The fact that Ostrander arrested Bell, impounded his car, and apparently stranded Wood in a high crime area at 2:30 a.m. distinguishes Wood from the general public and triggers a duty of the police to afford her some measure of peace and safety.

879 F.2d at 590; app. 9.

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[7]The second opinion was authored by Judge Thompson; the first by Judge Fletcher.

[8]The court also noted that respondent might be able to prove her claim by showing that Ostrander's conduct "shocks the conscience." 879 F.2d at 591, n.8; app. 12.

The court distinguished *DeShaney v. Winnebago Cty. Soc. Servs. Dept.*, __U.S.__, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989) with a single parenthetical explanation that it applies only where the state played no part in creating a danger. *Id.*

The court's decision on qualified immunity also remained largely unchanged. After dismissing petitioner's arguments that *White v. Rochford* was fairly distinguishable as an attempt to "interpose lawyerly distinctions", 879 F.2d at 593, it reiterated that petitioner was chargeable with knowledge that the Ninth Circuit would find *White* both factually applicable and controlling in these circumstances. 879 F.2d at 595; app. 20.

REASONS FOR GRANTING THE WRIT

1. This Case Presents An Important Question Concerning The Existence Of A Constitutional Duty Of State Officers To Protect Persons Not In Their Custody. The Ninth Circuit Has Failed To Apply The Principles Of This Court's *DeShaney* Decision And Has Reached A Result Which Conflicts With Other Circuits.

In *DeShaney*, this Court rejected an attempt to engraft a broad "special relationship" exception onto the general rule that the State's failure to protect an individual against private violence does not deprive persons of due process. *DeShaney* notes that such a duty had previously been found only "when the State takes a person into its custody and holds him there against his will...". 109 S.Ct. at 1005. The rationale for this duty to protect persons in custody was explained in the following way:

> The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf....In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf--*through incarceration, institutionalization, or other similar restraint of personal liberty*--which is the "deprivation of liberty" triggering the protections of the Due Process Clause... .

109 S.Ct. at 1006 (citation and footnote omitted, emphasis added).

The majority of circuits to consider "duty to protect" cases since *DeShaney* have held that a duty exists only in a custodial or quasi-custodial setting: *see, Horton v. Charles*, 889 F.2d 454 (3rd Cir. 1989) (on remand from Supreme Court for further consideration in light of *DeShaney*, held that duty existed where plaintiff was in constructive custody of police); *Stoneking v. Bradford Area School Dist.*, 882 F.2d 720 (3rd Cir. 1989), *cert. denied sub nom. Smith v. Stoneking*, __U.S.__, 58 U.S.L.W. 3449 (Jan. 16, 1990) (on remand from Supreme Court for further consideration in light of *DeShaney*, special relationship theory "no longer tenable"); *deJesus Benavides v. Santos*, 883 F.2d 385 (5th Cir. 1989); *McKee v. City of Rockwall, Texas*, 877 F.2d 409 (5th Cir. 1989), *cert. denied*, 58 U.S.L.W. 3427 (Jan. 9, 1990) (no duty to person not in custody); *cf., Lipscomb v. Simmons*, 884 F.2d 1242, 1246 (9th Cir. 1989) (custodial relationship with state central to existence of duty); *Doe v. Bobbitt*, 881 F.2d 510, 512 (7th Cir. 1989) (for duty to exist, circumstances must be analogous to incarceration).

The Eleventh Circuit in *Cornelius v. Town of Highland Lake, Ala*, 880 F.2d 348 (1989), like the Ninth Circuit in *Wood*, has treated the "special relationship" doctrine as seemingly independent of the "in-custody" limitation imposed by *DeShaney*. Both courts reached this result based on their reading of the following sentence in *DeShaney*:

> While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him more vulnerable to them.

DeShaney, 109 S.Ct. at 1006; *Cornelius*, 880 F.2d at 356; *Wood*, 879 F.2d at 590.

As pointed out by the dissent in *Wood*, to find an independent basis for a constitutional duty in this sentence ignores both the context of the statement and the critical reasoning of *DeShaney*. *Wood*, 879 F.2d at 600 (Carroll, D.J.

dissenting). The quoted language occurs in the midst of a two paragraph explanation of why the state's duty is limited to those in custody. It is immediately preceded by a footnote indicating the unsettled nature of the state's duty in situations "analogous to incarceration or institutionalization". 109 S.Ct. at 1006, n. 9. It cannot be read to create an independent source of duty. *cf. DeShaney* at 1004, n.4 (disapproving earlier "special relationship" cases).

The inability to harmonize *Wood* with *DeShaney* is further illustrated by the fact that state officials in *DeShaney* were actually aware of the danger to the child, had intervened in the situation for the very purpose of protecting against that danger, and had even taken the child into custody, then returned him to his father where he once again faced the same dangers. 109 S.Ct. at 1006. In this case, Ms. Wood was not the subject of direct state intervention; rather, her situation resulted from the apprehension of her companion for driving while intoxicated. This act, which a reasonable police officer might well believe placed her in a position of greater safety, is not analogous to taking a person into custody nor can such incidental contact with state officers fairly be said to create to a duty to protect respondent against unknown actors not connected with the state.

Thus, the *Wood* majority's creation of a duty independent of custodial relationships goes far beyond what this Court has authorized and, indeed, exceeds the scope of what many courts had permitted before *DeShaney*. *See, e.g. Archie v. City of Racine*, 847 F.2d 1211 (7th Cir. 1988) (*en banc*), *cert. denied*, __U.S.__, 109 S.Ct. 1338, 103 L.Ed.2d 809 (1989) (questioning and limiting special relationship doctrine and conceding "tension" with *White v. Rochford*); *Estate of Gilmore v. Buckley*, 787 F.2d 714 (1st Cir. 1986) (custody or control required); *Stoneking v. Bradford Area School Dist.*, 856 F.2d 594 (3rd Cir. 1988) (Stoneking I) ("functional custody"analysis); *Washington v. District of Columbia*, 802 F.2d 1478 (D.C. Cir. 1986) (duty limited to persons in custody).[9]

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[9]*Ingraham v. Wright*, 430 U.S. 651 (1977) is not to the contrary: the issue there was one of procedural due process protection against harm by

As illustrated by this case, the continued existence of a question as whether state officers have a duty to protect individuals with whom they interact in non-custodial relationships requires resolution by this Court. Despite *DeShaney*, the courts of appeals have not been able to agree on whether or when a "special relationship" gives rise to constitutional protection. Furthermore, the special relationship doctrine has not developed any concrete meaning but instead, "it has become a magic phrase, a category in which to dump cases when a court would like to afford relief." *Archie v. City of Racine, supra*, 847 F.2d at 1223.

This type of result oriented doctrine is no basis for constitutional jurisprudence and provides no guidance to public officers in the formulation of policy and allocation of resources. This Court has explicitly recognized the importance of issues arising from claims that the failure of governmental agents to protect an individual violates the Constitution. *DeShaney, supra*, 109 S.Ct. at 1002. The court below has imposed a constitutional duty of protection on public officials that is beyond the parameters of the Due Process Clause as defined by this Court in *DeShaney*, thereby creating a conflict not only with that decision but with those circuits which have limited the duty of protection to custodial settings. A decision of this Court is necessary to bring a reasonable degree of order and predictability to this seemingly unlimited area of public liability.

2. The Court Of Appeals' Inability To Meaningfully Articulate The Fault Requirement Applicable To Due Process Claims And The Conflict Between Circuits On This Question Requires That This Court Settle The Issue.

Since this Court's decisions in *Daniels v. Williams*, 474 U.S. 327 (1986) and *Davidson v. Cannon*, 474 U.S. 344 (1986), lower courts have struggled with the question left unresolved in those cases; i.e., whether a degree of fault which is greater

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a state actor, not a third party. Furthermore, *Ingraham* is based in part on the degree of custodial control exercised over school children by teachers. 430 U.S. at 659, n.12; 673.

than simple negligence but less than intentional conduct is enough to trigger the protections of the Due Process Clause.[10]

The major division among circuits appears between those which hold that conduct amounting to gross negligence is sufficient and those which require some greater level of fault. *See*, e.g. *Taylor v. Ledbetter, supra*, 818 F.2d at 793; *Nishiyama v. Dickson County, Tenn.*, 814 F.2d 277, 281-83 (6th Cir. 1987) (*en banc*); *Fargo v. City of San Juan Bautista*, 857 F.2d 638 (9th Cir. 1988) (gross negligence sufficient); *but see, deJesus Benavides v. Santos*, 883 F.2d 385, 388 (5th Cir. 1989); *Archie v. City of Racine*, 847 F.2d at 1219 (7th Cir. 1988); *Meyers v. Morris*, 810 F.2d 1437, 1468 (8th Cir. 1987), *cert. denied*, __U.S.__, 108 S.Ct. 97, 98 L.Ed.2d 58 (1987); *Committee of U.S. Citizens in Nicaragua v. Reagan*, 859 F.2d 929, 949-950 (D.C. Cir. 1988) (requiring more than gross negligence). As discussed in the text at 11, *post*, there is also a substantial division among those courts which require a showing greater than gross negligence as to the level of fault which must be proven.

In this case, the Court of Appeals initially drew upon the dissenting opinions in *Davidson* to hold that any degree of fault amounting to "gross negligence", "recklessness", or "deliberate indifference" would suffice. 851 F.2d at 1214-1215. After rehearing, the majority found it unnecessary to decide where the constitutional lineshould be drawn, because it believed there was sufficient evidence to indicate that petitioner "acted with deliberate indifference". 879 F.2d at 588.

However, to the extent the Court of Appeals hinted at its definition of "deliberate indifference", the suggestion still is that anything more than mere negligence is sufficient to carry the question to the jury. *See*, 879 F.2d at 588 n. 4 (leaving to district court the "difficult task" of defining various culpability standards, including "negligence", "gross negligence", "recklessness" and "deliberate indifference").

The Court of Appeals' undifferentiated use of these terms to describe the circumstances under which official conduct violates the Due Process Clause does not adequately

[10] *See, Daniels*, 474 U.S. at 334, n. 3 (reserving question).

distinguish conduct which may be merely tortious from that which amounts to an abuse of government power. *See, Davidson*, 474 U.S. at 347. Conduct which indicates a lack of care, however gross, and which does not involve the use of the state's power to cause injury is insufficient to state a constitutional claim. *Archie v. Racine*, 847 F.2d at 1220; *Committee of U.S. Citizens in Nicaragua v. Reagan*, 859 F.2d 950. Accordingly, it is necessary to specify a mental state which adequately reflects these limitations.

In the Eighth Amendment context, this Court has focused on the intent of state actors to identify claims of constitutional magnitude; i.e., whether the state action involved the "unnecessary and wanton infliction of pain", *Estelle v. Gamble*, 429 U.S. 97, 103 (1976); *Whitley v. Albers*, 475 U.S. 312, 320 (1986). While an express intent to injure is not required, it is "obduracy and wantonness" which is characteristic deliberate indifference. *Whitley* at 319.

However, because *Whitley* reserved the question whether the same standard would apply to a due process claim, 475 U.S. at 327, lower courts have been inconsistent in their application of the deliberate indifference test to such claims. *See, 10, ante*. Even among those courts requiring more than gross negligence, the use of traditional tort law terms, without further consideration of the purpose of Due Process protections,has led to uneven standards of liability. While some of these courts hold that deliberate indifference encompasses common law recklessness, *see*, e.g. *Committee of U.S. Citizens v. Reagan*, 859 F.2d at 949-951, others reject that proposition, e.g. *Washington v.District of Columbia*, 802 F.2d at 1481; *deJesus Benavides v. Santos*, 883 F.2d at 388, and still others have adopted a heightened definition of recklessness, e.g. *Archie v. City of Racine*, 847 F.2d at 1219.[11]

In this case, the Court of Appeals failed to discuss, let alone articulate, which of these standards it might apply. By ignoring the requirements of the deliberate indifference test

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[11]The use of a criminal recklessness test finds support in *Whitley*, 475 U.S. at 321.

as set forth in *Estelle* and *Whitley*, and also by neglecting to consider the degree of control (or lack thereof) which Trooper Ostrander had over Ms. Wood,[12] the Court of Appeals did not address the fundamental question of whether Due Process protections have been violated.

Definition of the appropriate mental state in Due Process cases clearly requires the same sort of analysis as in *Whitley*. Nevertheless, and despite many attempts, the circuits have not been able to reach a consistent result on this important question. Therefore, Petitioner respectfully submits that this Court should grant the writ and clarify the issue by definitively indicating at what point governmental conduct becomes so abusive as to infringe on substantive due process protections.

3. The Test Used By The Court of Appeals To Determine Whether Petitioner Violated A Clearly Established Right Improperly And Significantly Limits The Qualified Immunity Defense.

Public officials are generally entitled to immunity from suit for damages insofar as they do not violate clearly established rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In circumstances such as are presented here, where there is an absence of applicable precedent from this Court or the local circuit, the determination of whether a constitutional right is clearly established should be undertaken at two levels: first, the existence of the right must have been previously established by decisions which are analogous enough on their facts that their application to the defendant's conduct is apparent. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Second,

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[12]Several courts have recognized that the required mental state may differ depending on the circumstances of the alleged violation; i.e. the degree of governmet control over the situation and any independent reasons for the state's actions. *Committee of U.S. Citizens in Nicaragua v. Reagan*, 859 F.2d at 950; *Taylor v. Ledbetter*, 818 F.2d at 815-816 (Tjoflat, J. dissenting). Here, Trooper Ostrander did not have Ms. Wood in custody and presumably, could not restrain her. Yet, he also had Bell in his patrol car, under arrest, which may well have required the use of a second police unit to transport her. Under this Court's analysis in *Whitley*, these factors are relevant. 475 U.S. at 320.

those authorities which purport to establish a right must be sufficient to make that right "clearly established." *Cf. Harlow* at 818, n.32, where the Court found it unnecessary to determine how courts should determine the "state of the law."

While the court below generally followed this analytic framework, 879 F.2d at 591-593, it both misapplied the factual specificity requirements set forth in *Anderson*[13] and used a process of "retrospective prediction" to hinge immunity on a likelihood "that our circuit would have come to the same result the Seventh Circuit did in *White [v. Rochford]*". 879 F.2d at 593.

a. The Ninth Circuit's Analysis Conflicts with This Court's Decisions.

The fundamental flaw in the Ninth Circuit's analysis is that it requires public officials to anticipate subsequent legal developments, a charge which is clearly improper under *Harlow*. 457 U.S. at 818. Keeping in mind this Court's admonition in *Anderson* that clearly established law must be defined at a level whereby officials can "reasonably anticipate when their conduct may give rise to liability for damages", 483 U.S. 639, the Ninth Circuit's acceptance of a single divided opinion from a distant circuit in effect requires officials to base their conduct on the most adverse decisional law potentially applicable. This is also improper, because it defeats the purpose of qualified immunity by requiring that officials "err always on the side of caution". *Davis v. Scherer*, 468 U.S. 183, 196 (1984).

The onerous nature of the duty which the Ninth Circuit imposes on state officials is illustrated by the fact that before it declared *White* controlling, the court found it necessary to (i) "clarify the result in *White*" by analyzing two subsequent Seventh Circuit cases and (ii) to look to its own *post-incident*

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[13]For a discussion of the factual dissimilarities between *White* and this case, see the dissenting opinion below, 879 F.2d at 604, and the decision of district court, app. 69-70; *see also, Moore v. Marketplace Restaurant*, 754 F.2d 1336 (7th Cir. 1985) (distinguising *White*).

decision in *Escamilla v. City of Santa Ana, supra*, as evidence that it would have "found" these Seventh Circuit cases in 1984.[14] 879 F.2d at 593-594.

This extended analysis of *White* and related cases requires a level of legal scholarship (and outright guesswork) which is inconsistent with the reasonable police officer standard set down in *Harlow*. Even if a public official were so gifted, he or she would likely have reached the same conclusion as the Seventh Circuit itself, which has recognized that the contours of the duty described in *White* are "hazy and indistinct". *Ellsworth v. City of Racine*, 774 F.2d 182, 185 (7th Cir. 1985), *cert. denied*, 475 U.S. 1047 (1986). That this duty should, in the eyes of the Ninth Circuit, become clearly established four years later is explainable only because of the Ninth Circuit's improper focus on what result it would have reached, rather than what a reasonable police officer would have understood.

b. The Decision Of The Ninth Circuit Conflicts With Other Circuits.

The Ninth Circuit's willingness to declare a single opinion from another circuit as clearly establishing a constitutional right conflicts with the more cautious approach of other circuits Indeed, it is sadly ironic that the Seventh Circuit probably would not have deprived petitioner of immunity based on the *White*, because that circuit requires:

> such a clear trend in the case law that we can say with fair assurance that the recognition of the right was merely a question of time.

Hedge v. County of Tippecanoe, 890 F.2d 4, 7 (7th Cir. 1989); *see also, Doe v. Bobbitt, supra*, 881 F.2d at 511 (requiring "substantial consensus of opinion" that conduct violated constitutional right). The Sixth Circuit has adopted a similar view, stating:

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[14]The court did not explain how its ability to locate cases in the Federal Reporter is relevant to whether a police officer should reasonably have known five years prior that it would consider those cases applicable to the instant situation.

> *Harlow's* "objective legal reasonableness" test does not require state officials to know and to follow the most advanced state of the law as established by a remote court of the land.

Eugene D. v. Karmen, 889 F.2d 701, 708 (6th Cir. 1989)[15]; *see also, Williams v. Treen*, 671 F.2d 892, 898 (5th Cir. 1982) ("clear jurisprudential trend" required).

In *Malley v. Briggs*, 475 U.S. 335, 341 (1986), this Court indicated:

> As the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law.

The tests utilized by the Fifth, Sixth and Seventh Circuits are consistent with this scope of the immunity defense. The Ninth Circuit's analysis is not, because it requires police officers to "analyze and parse an opinion (that they never heard of) utilizing the legal skills and reasoning of an appellate judge". *Wood*, 879 F.2d at 604 (Carroll, D.J. dissenting).

Consequently, the decision below significantly alters the balance which this Court has sought to achieve in its decisions defining the qualified immunity defense. Because this Court has not yet spoken directly to the question of how lower courts should determine clearly established law in the absence of applicable authority within the circuit where the case arose, there is a need for a decision which would establish a consistent national standard on this troublesome question. This case presents compelling circumstances under which this Court should decide the issue.

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[15]In *Davis v. Holly*, 835 F.2d 1175, 1182 (1987), the Sixth Circuit also stated that "a single idiosyncratic opinion" of another circuit was insufficient to put defendants on notice.

CONCLUSION

As to each of the three questions presented, the decision of the Court of Appeals has created standards with respect to the duties and liabilities of state officers which are of grave importance and which should be decided by this Court. Accordingly, the petition should be granted and a writ of certiorari issued to review the decision below.

Dated this 28th day of February, 1990.

Respectfully submitted,

KENNETH O. EIKENBERRY
Attorney General

MICHAEL MADDEN
RENE TOMISSER
CAROL A. SMITH*
Assistant Attorneys General
Attorneys for Petitioner

*Counsel of Record

APPENDIX A

OPINION

THOMPSON, Circuit Judge:

Linda Wood brought this action under 42 U.S.C. § 1983 against Washington State Trooper Steven Ostrander and his wife, and Neil Maloney, Chief Officer of the Washington State Patrol and his wife. Wood appeals the district court's summary judgment dismissal of the case as to all defendants. We affirm the district court's dismissal as to Maloney and his wife, but reverse the dismissal as to Ostrander and his wife.[1]

FACTS

At 2:30 a.m., on the morning of September 23, 1984, Trooper Ostrander pulled a car to the side of the road for driving with its high beams on. Ostrander determined that the driver, Robert Bell, was intoxicated and placed him under arrest. Ostrander called for a tow truck to have the car impounded, and returned to the car and removed the keys. Wood, who was sitting in the car, asked Ostrander how she would get home. Ostrander replied that he was sorry, but that

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[1]Wood has not presented any argument on appeal, or raised any issue, challenging the district court's dismissal of the case as to Maloney and his wife. It is well settled in this circuit that claims not addressed in an appellant's brief are deemed abandoned, absent a showing that manifest injustice will result. *United States v. Loya*, 807 F.2d 1483, 1487 (9th Cir. 1987); *Collins v. City of San Diego*, 841 F.2d 337, 339 (9th Cir. 1988). No such showing has been made in this case.

The claim against Mrs. Ostrander is different. Although no mention of her is made in the appellant's brief, it appears she was named as a defendant in the case solely for the purpose of attempting to subject the marital community of the Ostranders to liability for any judgment which might be entered against Trooper Ostrander. *See Brink v. Griffith*, 396 P.2d 793, 795 (Wash. 1964). We express no opinion on the merits of the claim against Mrs. Ostrander. However, given the limited purpose of this claim and its dependency on the claim against Trooper Ostrander, we do not deem it to have been abandoned at this time.

Wood would have to get out of the car. These facts are not disputed. Wood claims that Ostrander simply returned to his patrol car and drove away. Ostrander claims that he offered to call a friend or family member who could give Wood a ride home, but that she declined the offer. Although Wood claims that she did not see any open business at the time Ostrander drove away, Ostrander claims that a Shell service station and a Seven-Eleven store were clearly visible and open for business. Ostrander further claims that Wood was picked up by an unknown driver before Ostrander drove away, although Bell and Wood dispute this.

Ostrander left Wood near a military reservation in the Parkland area of Pierce County, which has the highest aggravated crime rate in the county outside the City of Tacoma. The temperature was fifty degrees and Wood was wearing only a blouse and jeans. Wood alleges that after walking one-half block toward her home, which was five miles away, and having turned down rides offered by three or four strangers, she accepted a ride with an unknown man. The driver took Wood to a secluded area and raped her.

The district court denied defendants' first summary judgment motion, ruling that Ostrander's actions could not be characterized as merely negligent. Subsequently, the district court granted defendants' second motion for summary judgment, on the ground that Ostrander was entitled to good faith qualified immunity, and that Ostrander owed no "affirmative constitutional duty of protection" to Wood.[2]

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[2]The district court did not rule on defendants' argument that the damages claim should be dismissed on proximate cause grounds. Although this court could presumably affirm on that basis if it had legal merit and factual support in the record, *see, e.g., Lee v. United States*, 809 F.2d 1406, 1408 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 772 (1988), defendants have not raised the proximate cause argument on appeal. We have not examined its merits.

We review the district court's grant of summary judgment de novo to determine whether there is any genuine issue of material fact and whether the substantive law was correctly applied. *Darring v. Kincheloe*, 783 F.2d 874, 876 (9th Cir. 1986). All facts in the record and inferences drawn from them must be viewed in the light most favorable to the non-moving party. *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1250 (9th Cir. 1982), *cert. denied*, 459 U.S. 1227 (1983).

DISCUSSION

I. *Viability of the Section 1983 Claim*

To sustain an action under section 1983, a plaintiff must show (1) that the conduct complained of was committed by a person acting under color of state law; and (2) that the conduct deprived the plaintiff of a federal constitutional or statutory right. *Rinker v. County of Napa*, 831 F.2d 829, 831 (9th Cir. 1987) (citing *Parratt v. Taylor*, 451 U.S. 527, 535 (1981)). It is not disputed that in arresting Bell and impounding the car, Ostrander was acting under color of state law. Ostrander argues, however, that Wood has failed to state a claim cognizable under section 1983 because, first, his conduct was at most negligent and, second, Wood has adequate state remedies to pursue her claim. These issues are considered in turn.

A. *The "Mere Negligence" Bar*

In *Daniels v. Williams*, 474 U.S. 327, 330-32 (1986), and *Davidson v. Cannon*, 474 U.S. 344, 347 (1986), the Supreme Court held that mere negligence or lack of due care by state officials does not trigger the protections of the fourteenth amendment and therefore does not state a claim under section 1983. In doing so, the Court overruled that part of *Parratt*, 451 U.S. at 536-37, which held that a negligent loss of property by state officials could be a "deprivation" under the due process clause. *Daniels*, 474 U.S. at 330-31. However,

the Court expressly left open the question "whether something less than intentional conduct, such as recklessness or 'gross negligence,' is enough to trigger the protections of the Due Process Clause." *Id.* at 334 n.3.

A number of circuits have held recklessness or gross negligence sufficient to state a section 1983 claim; none has held that only intentional misconduct will suffice. *See, e.g., Taylor v. Ledbetter*, 818 F.2d 791, 793 (11th Cir. 1987) (en banc) (claim that state officials "were 'grossly negligent' or 'deliberately indifferent' " is "sufficient to overcome either a *Daniels* or *Davidson* bar"); *Vinson v. Campbell County Fiscal Court*, 820 F.2d 194, 199-200 (6th Cir. 1979) (gross negligence cognizable under section 1983); *White v. Rochford*, 592 F.2d 381, 385 (7th Cir. 1979) (gross negligence or reckless disregard for the safety of others cognizable); *see also Davidson v. O'Lone*, 752 F.2d 817, 828 (3rd Cir. 1984) (en banc), *aff'd sub nom., Davidson v. Cannon*, 474 U.S. 344 (1986) (gross negligence or reckless indifference sufficient) (plurality view).[3]

The law in this circuit is unclear. In *Fargo v. City of San Juan Bautista*, 857 F.2d 638 (9th Cir. 1988) we stated that "grossly negligent or reckless official conduct that infringes upon an interest protected by the due process clause is actionable under section 1983." *Id.* at 640. We based this statement, however, on the first opinion in this case, *Wood v. Ostrander*, 851 F.2d 1212, 1214-15 (9th Cir. 1988). The first *Wood* opinion has been amended by this opinion. Moreover, the gross negligence standard which we articulated in our first *Wood* opinion was based on *Ketchum v. County of Alameda*,

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[3] *Jackson v. City of Joliet*, 715 F.2d 1200, 1206 (7th Cir. 1983), *cert. denied*, 465 U.S. 1049 (1984), is not *contra*. There, the court found that a grossly negligent rescue attempt was not actionable under section 1983 where the plaintiff's decedents were already trapped in a burning car when the police arrived. The court expressly distinguished cases in which the state officials' actions created the danger or created a special duty of protection toward the plaintiff. *See id.* at 1204-05. We discuss *Jackson* in more detail *infra*.

811 F.2d 1243 (9th Cir. 1987). *Ketchum* involved a claim by a woman who was raped by an escaped inmate. The victim contended the county had been grossly negligent in maintaining security at the facility where the inmate had been confined. We affirmed summary judgment in favor of the state defendants on the ground that the victim, as a member of the public at large, did not have "a special relationship with the state or the criminal," and hence "had no federal constitutional right to state protection from criminal attacks." *Id.* at 1247. We did not decide the question of what culpability standard would have been applicable if such a relationship had existed. *Id.* at 1246 n.3.

The Supreme Court has recently adopted the standard of deliberate indifference as the culpability standard necessary to establish section 1983 liability of a municipality based upon a claim that the municipality's lack of training for police officers was a policy causing a violation of a constitutional right of a person subject to police action. *City of Canton v. Harris*, _ U.S. _, 109 S. Ct. 1197 (1989). The Court in *Canton* expressly reserved the question whether the deliberate indifference standard would also apply to "an underlying claim of a constitutional violation." *City of Canton v. Harris*, 109 S. Ct. at 1204 n.8. Despite this reservation, however, *Canton* calls into question our statements in *Fargo* and in our prior opinion in this case that a showing of gross negligence will suffice to establish the requisite level of fault in a section 1983 action against an individual state actor such as Trooper Ostrander.

[1] Here, however, Wood has raised a genuine issue of fact tending to show that Trooper Ostrander acted with deliberate indifference to Wood's interest in personal security under the fourteenth amendment. *See Taylor v. Ledbetter*, 818 F.2d at 793, 795-97 (deliberate indifference to victim's well-being is more than negligence and supports section 1983 claim); *Davidson v. O'Lone*, *supra*, 752 F.2d at 828; *see also Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976), *reh'g denied*, 429 U.S.

1066 (1977) (prison officials' deliberate disregard of prisoner's serious illness or injury violates eighth amendment and is cognizable under section 1983). The rationale underlying *Daniels*' bar of negligence-based section 1983 claims is that mere lack of due care, such as leaving a pillow on the prison stairs (*Daniels*) or mislaying an inmate's property (*Parratt*) is "quite remote" from the fourteenth amendment's purpose of redressing abuses of power by state officials. 474 U.S. at 332. In the present case, the facts put in issue by Wood—that Ostrander arrested the driver, impounded the car, and left Wood by the side of the road at night in a high-crime area—‡show an assertion of government power which, according to Wood's version of the case, tends to show a disregard for Wood's safety amounting to deliberate indifference.[4]

B. *The "State Remedies" Bar*

Parratt v. Taylor, 451 U.S. at 541-44, and its progeny hold that a deprivation of liberty or property is not cognizable under section 1983 when a state's post-deprivation remedies are adequate to protect a victim's procedural due process rights. *See, e.g., Hudson v. Palmer*, 468 U.S. 517, 533 (1984).[5] However, "[t]he *Parratt* line of cases does not focus on the relevance of procedural protections to alleged violations of *substantive* constitutional rights." *Smith v. City of Fontana*, 818 F.2d 1411, 1414 (9th Cir. 1987), *cert. denied*, 108 S. Ct 311 (1988). Accordingly, the existence of state remedies is

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[4]A jury presented with these facts might find Ostrander's conduct to have been "deliberately indifferent," "reckless," "grossly negligent," or merely "negligent." *See Fargo v. City of San Juan Bautista*, 857 F.2d 638, 641 (9th Cir. 1988) ("When reasonable persons may disagree as to whether particular conduct constitutes negligence, gross negligence or recklessness, the question is one of fact to be decided by a jury." (footnote omitted)). It is thus likely the district court will face the difficult task of defining for the jury the terms "negligence," "gross negligence," "recklessness," and "deliberate indifference." *See Daniels*, 474 U.S. at 334-35; *Fargo*, 857 F.2d at 641-42.

[5]This aspect of *Parratt* was not overruled by *Daniels*.

irrelevant and the *Parratt* bar inapplicable where the plaintiff alleges a violation of a substantive right under either the Bill of Rights or the due process clause. *Smith*, 818 F.2d at 1415; *accord Mann v. Tucson Dept. of Police*, 782 F.2d 790, 792-93 (9th Cir. 1986) (per curiam); *see also Daniels*, 474 U.S. at 337-39 (Stevens, J., concurring) (section 1983 claim alleging violation of substantive due process not barred by existence of state remedy); *Parratt*, 451 U.S. at 545 (Blackmun, J., concurring) (due process clause extends beyond procedural matters).

Ostrander argues that the existence of a state tort remedy for Wood precludes the section 1983 claim under *Parratt*. According to Ostrander, the only distinction between this case and the *Parratt* line is that *Parratt* and its progeny involve deprivations of property whereas this case involves an alleged deprivation of liberty. *See Ingraham v. Wright*, 430 U.S. 651, 674-75 (1977) (child had liberty interest in personal security and freedom from restraint and infliction of pain). Ostrander argues that we should anticipate a Supreme Court holding to the effect that *Parratt* extends to deprivations of liberty, because the Court cited certain section 1983 cases involving assaults to support its conclusion that *Parratt* extends to intentional deprivations of *property*. *See Hudson v. Palmer*, 468 U.S. at 531 n.10, 533-34 n.14. Ostrander also relies on this court's decision in *Rutledge v. Arizona Board of Regents*, 660 F.2d 1345, 1352 (9th Cir. 1981), *aff'd sub nom. Kush v. Rutledge*, 460 U.S. 719 (1983), which held in part that a college football coach's assault on a player was not cognizable under section 1983.

Ostrander's argument is unpersuasive, because it follows the wrong axis of analysis. This circuit has analyzed *Parratt* and its progeny not by distinguishing liberty versus property deprivations, but rather by analyzing substantive versus procedural rights deprivations. *See, e.g., Smith v. City of Fontana*, 818 F.2d at 1414-15. The relevant inquiry is whether the deprivation is sufficiently serious that " 'the constitu-

tional line ha[s] been crossed' so as to constitute a deprivation of substantive due process." *Rutherford v. City of Berkeley*, 780 F.2d 1444, 1447 (9th Cir. 1986). *Ingraham* and *Rutledge* do not suggest otherwise. In *Ingraham*, the Court considered only a procedural due process challenge based on the lack of a hearing before corporal punishment was meted out. *See* 430 U.S. at 674, 680-83. In *Rutledge*, this court did not analyze the seriousness of the assault, deciding that *Parratt* was preclusive of such inquiry. 660 F.2d at 1352. To the extent that *Rutledge* found *Parratt* to bar section 1983 claims for substantive rights violated by official assaults, it does not survive this court's en banc ruling in *Haygood v. Younger*, 769 F.2d 1350, 1356 (9th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986). More generally, substantive due process violations comprise those acts by the state that are prohibited "regardless of the fairness of the procedures used to implement them." *Daniels*, 474 U.S. at 331.

[2] The seriousness of the official misconduct may determine whether "the constitutional line" between a procedural and a substantive due process violation "has been crossed," so that the availability of state court relief will not bar a section 1983 claim. Clearly, the line is crossed in instances of serious police brutality. *See, e.g., Rutherford*, 780 F.2d at 1448. But *Rutherford* only "[p]artially answer[ed] the question left open in *Haygood*" as to whether "official assaults, batteries or other invasions of personal liberty" amount to substantive due process violations. *Id.* While brutality by police or prison guards is one paradigmatic example of a substantive due process violation, it does not exhaust the possibilities.

Although Ostrander did not himself assault Wood, he allegedly acted in callous disregard for Wood's physical security, a liberty interest protected by the Constitution. *See Ingraham v. Wright, supra.*

[3] Wood has raised a triable issue of fact as to whether Ostrander's conduct "affirmatively placed the plaintiff in a posi-

tion of danger." *Ketchum*, 811 F.2d at 1247; *see Jackson v. City of Joliet*, 715 F.2d at 1204 (distinguishing situation where arrest creates the danger, actionable under section 1983, from situation where danger existed before defendant acted); *see also DeShaney v. Winnebago Cty. Soc. Servs. Dept.*, _ U.S. _, 109 S.Ct. 998, 1006 (1989) (distinguishing situation where state "played no part" in creating the dangers that minor child faced by remaining in his father's custody "nor did [the state] do anything to render [the child] any more vulnerable to them."). The fact that Ostrander arrested Bell, impounded his car, and apparently stranded Wood in a high-crime area at 2:30 a.m. distinguishes Wood from the general public and triggers a duty of the police to afford her some measure of peace and safety. *See White v. Rochford*, 592 F.2d at 384 & n.6 (and authorities cited therein). *See also Chambers-Costenes v. King Co.*, 100 Wn.2d 275, 669 P.2d 451 (1983); Plaintiff's Opposition to Summary Judgment, Exhibits 1, 2(c) (policy of state police to respond to requests for assistance in courteous and judicious manner).

[4] Wood also has raised at least a triable issue (if not an undisputed one) regarding Ostrander's knowledge of the danger: official crime reports show that the area where Wood was stranded had the highest violent crime rate in the county outside the City of Tacoma. Ostrander, a state trooper stationed in that area since 1981, may well be chargeable with knowledge of these facts. Moreover, the inherent danger facing a woman left alone at night in an unsafe area is a matter of common sense. *Cf. White v. Rochford, supra.*

[5] Most of the factual disputes in this case go to the issue of danger. Defendants contend, and the trial court found, that a 24-hour Shell station and a 24-hour Seven-Eleven store were located within two blocks of the location of the stop. Defendants further contend that there were paved sidewalks. Even if there is no genuine factual dispute as to these matters, their relevance is open to question by the trier of fact. The district court and the defendants too readily assume

that Wood's travail would have been over if she had only gone to the Shell station or the Seven-Eleven. It is for the trier of fact to determine whether a reasonable person should have regarded a gas station or convenience store, located in a high crime neighborhood, as some kind of safe haven where she would have been given assistance or permitted to stay until daybreak before walking five miles home. Nor is a telephone much help to a person who allegedly has no money to place a call and no one to call.[6] These factual assumptions, either expressly or impliedly made, are particularly inappropriate for the district court to make on summary judgment.

There is a factual dispute as to whether Ostrander made any inquiry at all as to Wood's ability to get safely home, or whether, instead, he ignored her request for help. Certain evidence suggests that Ostrander untruthfully told his superiors that he was told that Wood was being picked up by some "friends," (Exhibit 4 to Plaintiff's Summary Judgment Opposition), and it is disputed whether Ostrander saw Wood picked up at all. Moreover, we cannot resolve on our review of summary judgment whether Wood acted unreasonably by accepting a ride with an unknown man. The resolution of these questions is for the trier of fact.

We are satisfied that Wood has presented genuine issues of material fact on the question of whether Ostrander deprived her of a liberty interest protected by the Constitution. *See Ingraham v. Wright, supra*; *Haygood v. Younger*, 769 F.2d at 1356.

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[6]Wood alleged that she had little or no money on her person at the time Ostrander put her out of the car. Although she lived with her parents, she did not try to call them for help because, according to her allegations, they would have been unable to pick her up: her mother has night-blindness and her stepfather suffers from brain damage. How much of these circumstances Wood may have told Ostrander is not clear from the record. Ostrander denies knowledge of any of these allegations.

II. *Qualified Immunity*

State officials cannot be held liable for damages under section 1983 unless their conduct violates a clearly established constitutional right. *Davis v. Scherer*, 468 U.S. 183, 194, *reh'g denied*, 468 U.S. 1226 (1984). Officials are entitled to qualified immunity if their conduct is objectively reasonable " 'as measured by reference to clearly established law.' " *Id.* at 191 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Ostrander is entitled to summary judgment based on qualified immunity if he can show that as a reasonable officer he could have believed his actions toward Wood were constitutional even if they were not. *Vaughn v. Ricketts*, 859 F.2d 736, 739 (9th Cir. 1988). *See Anderson v. Creighton*, 107 S. Ct. 3034, 3038 (1987). The district court concluded that Ostrander was shielded by qualified immunity. We review this conclusion de novo. "Assuming that [Wood] can prove the acts attributed to [Ostrander], we must decide the entirely legal issue of 'whether the facts alleged . . . support a claim of violation of clearly established law.' " *Vaughan v. Ricketts*, at 739 (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 528 n.9).

The events on which Wood predicates her section 1983 claim occurred September 23, 1984. We have held above that Wood has raised genuine issues of material fact as to a number of these events. If the events occurred as Wood alleges, she has stated a violation of her constitutional right to personal security, a liberty interest protected by the fourteenth amendment. *See Ingraham v. Wright*, *supra*. We now consider, in light of Ostrander's qualified immunity defense, whether a reasonable police officer in his position could have believed on September 23, 1984, that his treatment of Wood, as alleged by her, comported with the Constitution even though, assuming the trier of fact accepts Wood's version of the case, it actually did not.[7] To resolve this question, we

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[7]Should the trier of fact find that Ostrander's treatment of Wood was deliberately indifferent, this alone might deprive Ostrander of his qualified

must "survey the legal landscape" as it existed in September 1984 to determine whether it had been clearly established at that time that Ostrander's alleged conduct violated Wood's liberty interest under the Constitution.[8] *Ward v. County of San Diego*, 791 F.2d 1329, 1332 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 3263 (1987).

A. *The Law in 1984*

In *Capoeman v. Reed*, 754 F.2d 1512, 1514 (9th Cir. 1985), this court held that "in the absence of binding precedent, a court should look to whatever decisional law is available to ascertain whether the law is clearly established under the *Harlow* test." *Accord, Bilbrey v. Brown*, 738 F.2d 1462, 1466 (9th Cir. 1984). The available decisional law includes cases from state courts, other circuits and district courts. *Ward v. County of San Diego*, 791 F.2d at 1332.

The case most like our case is *White v. Rochford*, 592 F.2d 381 (7th Cir. 1979), which reversed the dismissal of a section 1983 complaint. In *White*, the defendant police officers

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immunity defense. *See Wood v. Sunn*, 865 F.2d 982, 987 (9th Cir. 1988) ("Despite [*Anderson v. Creighton*, 107 S. Ct. 3034 (1987)], the [rule of *Albers v. Whitley*, 743 F.2d 1372, 1376 (9th Cir. 1984), *reversed on other grounds*, 475 U.S. 312 (1986)] that 'a finding of deliberate indifference is inconsistent with . . . qualified immunity' remains the law of the circuit."). We do not reach this issue, however, because we hold *infra* that apart from the applicable culpability standard for Ostrander's conduct, he is not entitled to qualified immunity under the facts presented by Wood.

[8]Wood also argues that Ostrander's treatment of her was so egregious that it "shocks the conscience" and violated her constitutional right to substantive due process. *See Rutherford*, 780 F.2d at 1446-47 (citing *Rochin v. California*, 342 U.S. 165, 172 (1952), *overruled on other grounds, Mapp v. Ohio*, 367 U.S. 643 (1961)). We do not decide this question because we resolve this appeal on the ground that Wood has shown sufficient facts which, if proven at trial, establish a violation of her right to personal security, a liberty interest protected by the fourteenth amendment. This does not foreclose Wood from attempting to show at trial that Ostrander's treatment of her was such that it "shocks the conscience."

arrested a driver for drag racing on the Chicago Skyway, a busy, limited-access highway. The complaint alleged that the driver, who was uncle to the three minor children riding with him in the car, pleaded with the officers to take the children to the police station or a phone booth so that they could contact their parents. The officers refused, and instead left the children in the abandoned car on the roadside, in inclement weather. The court held that the alleged conduct stated a claim under section 1983. The officers "could not avoid knowing that, absent their assistance, the three children would be subjected to exposure to cold weather and danger from traffic. *This indifference in the face of known dangers certainly must constitute gross negligence.*" 592 F.2d at 385 (emphasis added).

In dealing with *White*, decided five years before the incident in this case, Ostrander frames the immunity issue thus:

> In determining whether Ms. Wood was subjected to a constitutional deprivation it is the state of the law on September 23, 1984, which must be used to determine whether the violation occurred . . . . As of September 23, 1984, no court had ruled that a police officer owed a *constitutional* duty to make transportation arrangements for a non-intoxicated adult female who was left on the sidewalk of a major urban arterial within easy walking distance of at least two 24-hour businesses following the arrest of the person with whom she had previously been riding.

Appellees' Brief at 9 (citation omitted). Ostrander seemingly suggests that this case can be disposed of if it does not bear a strict factual similarity to previous cases finding liability. However, this crabbed view of the good faith immunity principle cannot withstand analysis. As the Supreme Court recently reaffirmed, it is not the case that "an official action is protected by qualified immunity unless the very action in question has previously been held unlawful. . . . but it is to

say that in light of preexisting law the unlawfulness must be apparent." *Anderson v. Creighton*, 107 S. Ct. at 3039 (citation omitted); *see Mitchell v. Forsyth*, 472 U.S. at 535 n.12.

The first question is whether *White* is meaningfully distinguishable from the instant case. Both cases involve a police officer's roadside abandonment of non-arrested third parties. Ostrander apparently would have the court decide that stranding three children on a busy eight-lane expressway is much worse than stranding a lone woman in a high-crime area at 2:30 a.m., indeed so much worse that the former is a constitutional violation while the latter is not. It would seem that the Supreme Court's admonition in *Anderson* against looking for a repetition of "the very action in question" applies forcefully against making this type of comparison. Although the dangers facing the victims in the two cases may come from very different sources, the degree of danger is high in both, and the alleged police indifference to exposing the plaintiffs to the dangers is apparent in both instances. Ostrander's suggestion that the children were in greater danger than Wood ("*certain danger* from the traffic and weather," Appellees' Brief at 10) is unpersuasive considering what actually occurred: none of the children was injured by a car (two suffered mental anguish, and a third suffered aggravation of his asthma condition from the weather), whereas Wood was raped.

Ostrander also argues that *White* was merely a "plurality" opinion and, further, adopted an "*in loco parentis*" rationale, finding that the officers owed a special duty to the children. This argument mischaracterizes *White*. The opinion of the court and the concurrence agree on the basic rationale of section 1983 liability: "indifference [of the officers] in the face of known dangers," 592 F.2d at 385 (opinion of court); "[u]nnecessarily endangering *the innocent parties* in reckless disregard of their safety," *id.* at 388 (concurrence) (emphasis added). The opinion of the court states that the officers could be liable under section 1983 based on two theories: (1) for an

"intrusion upon personal integrity" as a result of gross negligence or reckless disregard for the safety of others, or (2) for conduct which "shock[s] the conscience." *White*, 592 F.2d at 384-85 & n.6. The "*in loco parentis*" concept was introduced only in the second half of a lengthy footnote to buttress the existence of the state's duty as it arose in the case, and not as the sole basis for such duty. *Id.* at 384 n.6.

The immunity standard considers whether a reasonable law enforcement officer should view the *White* case as controlling. Given this element of reasonableness, the qualified immunity regime of clearly established law should not be held to allow section 1983 defendants to interpose lawyerly distinctions that defy common sense in order to distinguish away clearly established law. *White* holds that a police officer may be liable under section 1983 when he abandons passengers of arrested drivers under circumstances which expose them to unreasonable danger. It defies common sense to find a meaningful legal distinction between the dangers facing children crossing a busy highway and a woman left alone to fend for herself at 2:30 a.m. in a high-crime area.

B. *The Precedential Effect of White in This Circuit*

The inquiry does not end here, however, because *White* did not necessarily establish law for this circuit. Where there are few cases on point, and none is binding, "an additional factor that may be considered in ascertaining whether the law is 'clearly established' is a determination of the likelihood that the Supreme Court or this circuit would have reached the same result" as the non-binding authorities at that time. *Capoeman*, 754 F.2d at 1515; *accord Ward*, 791 F.2d at 1332.

There was no Supreme Court case, or case in this circuit, which was binding on this circuit when the events in this case occurred. Therefore, we begin with an analysis of whether it was likely, in September 1984, that our circuit would have come to the same result the Seventh Circuit did in *White*. In

this analysis it is important to clarify the result in *White*. There were three opinions in the case. The lead opinion was written by Judge Sprecher. Judge Tone concurred in part. Judge Kilkenny of our circuit was sitting by designation and he dissented. Judges Sprecher and Tone agreed that when the police officers arrested the children's uncle and took him away, they left the children exposed to the "hazards" of "an immobilized car on a highspeed expressway and [the] cold", and that this conduct violated the children's "federally protected right to be free from unjustified intrusions on their personal security by the police." *White* at 387 (Tone, J., concurring); *compare id.* at 384-85 (Sprecher, J., lead opinion)).

White was decided in 1979. Four years later the Seventh Circuit decided *Jackson v. City of Joliet*, 715 F.2d 1200 (1983). In *Jackson*, a car swerved off the road, crashed and burst into flames. Two minutes later a Joliet policeman arrived on the scene by chance. The car's wheels were spinning, its lights were on, its motor was running, and it was burning. The officer, however, made no attempt to determine whether it was occupied and did not call an ambulance. He did call the fire department. He then returned to the road and directed traffic away from the scene of the accident. Firemen arrived eight minutes later. They made no attempt to remove or assist the occupants of the car who were observed slumped in the front seat. The occupants died. An action was filed under section 1983 alleging that the occupants of the car could have been saved if the officer had aided them, or called an ambulance, or at least not directed traffic in a way that prevented other potential rescuers from saving them, or if the firemen had tried to aid them. The district court denied motions to dismiss for failure to state a claim. The Seventh Circuit reversed. The court stated:

> We hold that an attempt by state officers to assist at an accident is not a deprivation of life without due process of law under the Fourteenth Amendment

> when the attempt fails because of the negligence or even gross negligence of the officers or their superiors, and the accident victim dies.

Id. at 1206. The *Jackson* court distinguished its "officer-who-comes-upon-an-accident" case from *White*: "In *White v. Rochford* the arrest created the danger to the children; here the [occupants of the wrecked car] were in great danger before the [police and firemen] appeared." *Id.* at 1204. The *Jackson* court amplified its distinction of *White* as a case "where the police arrested a driver and left his child passengers stranded in a driverless car, thus putting the children in a situation of peril for the consequences of which the police were held liable under section 1983". *Id.*

Between *White* and *Jackson*, the Seventh Circuit decided *Bowers v. DeVito*, 686 F.2d 616 (7th Cir. 1982). Judge Posner wrote the opinions in *Bowers* and *Jackson*. In *Jackson* he noted that *Jackson* was closer to *Bowers* than to *White*. He stated that in *Bowers* "the state officers did not create but merely failed to avert danger, by negligently releasing from custody a dangerous lunatic who then killed the plaintiff's decedent." *Jackson* at 1204-05. In *Bowers* Judge Posner noted the difference which would exist if the state placed a person in danger. He stated:

> If the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit.

Bowers, 686 F.2d at 618.

Would we, in 1984, have followed the holding of *White*, and the logic of Judge Posner's comments in *Bowers* and *Jackson*? We believe most certainly we would have. In *Escamilla v. City of Santa Ana*, 796 F.2d 266 (9th Cir. 1986)

we affirmed summary judgment in favor of police officers in a section 1983 action where the police had been involved in a shootout in a barroom and a bystander had been killed by a stray bullet fired by a suspect. We distinguished the *Escamilla* case from a case in which the officers "create or exacerbate the danger," *Escamilla* at 269, and we cited Judge Posner's language from *Bowers*, quoted above, as support for this distinction. *Id.*

We do not look to *Escamilla*, a post-incident decision, to determine whether the law was "clearly established" at the time of the incident in the present case. *Capoeman v. Reed*, 754 F.2d at 1515. We don't have to. By 1984, the law had been established by *White* and clearly articulated by *Bowers* and *Jackson*. We do consult *Escamilla* to note that it cited *Bowers* with approval and quoted Judge Posner's comments in that case. *Escamilla* also cited *Jackson*. Having found *Bowers* and *Jackson* in 1986 when we wrote *Escamilla*, we have no doubt we would have found these cases in 1984. The question is, would we have followed their reasoning, and the *White* case which *Jackson* cited?

In *Capoeman v. Reed*, *supra*, we affirmed summary judgment in favor of prison officials who, in 1981, cut Capoeman's hair over his objection that he wore it long for religious purposes, and in spite of his citation to supporting Eighth Circuit authority. *Capoeman*, 754 F.2d at 1513. We noted that in addition to the Eighth Circuit case cited by Capoeman, there were two other opinions from the Second Circuit, all of which were on the books at the time the officials cut Capoeman's hair and all of which supported his position. We refused to follow these cases. We did not have a case in our circuit on point. We stated that "[t]o make the determination [of the likelihood the Supreme Court or this circuit would have reached the same result as the cases which supported Capoeman], we examine the legal analysis employed by . . . courts [which had considered the issue] and compare it to the analysis being used at that time by the Ninth Circuit in

related but factually different situations." *Id.* at 1515. We then noted that various courts had "applied a number of different legal standards to prisoner claims of infringement of free exercise rights." *Id.* We cited a law review article which identified "at least seven different standards for analyzing prisoner free exercise claims." *Id.* Capoeman contended that instead of cutting his hair, the prison officials should have tied it back to take the picture they claimed they needed to identify him wearing short hair. He thus asserted a "least restrictive means" for the prison to accomplish its purpose of prisoner identification. We noted that outside of our circuit there was a "wide diversity" in standards which had been applied by various courts of appeals in considering how to deal with such prisoner claims. *Id.* Within our circuit we cited *Jones v. Bradley*, 590 F.2d 294 (9th Cir. 1979), in which an inmate challenged the prison's denial of the use of the prison chapel. We commented that in *Jones* our circuit had "concluded that the state had a legitimate interest in placing *appropriate restrictions* on chapel use that were reasonable to maintain order and security," (emphasis added), and that we had given "no indication that 'appropriate restrictions' meant the least restrictive means" for which Capoeman contended. *Id.* at 1515-16. In view of what appeared to be conflicting authority from other circuits, as well as case law from our circuit which cut against Capoeman's claim, we concluded that the law had not been so clearly established that the prison officials were not entitled to qualified immunity. *Id.* at 1516.

[6] At the time of the incident in the present case, the Seventh Circuit cases previously noted had been decided. These cases support Wood's position. At the time of the incident in this case, no other case had rejected a section 1983 claim such as Wood's. There was no "wide diversity" of cases which had considered such claims and which had arrived at differing results. *Cf. Capoeman*, 754 F.2d at 1515. And there was nothing in our circuit to indicate that we would have decided this case differently from *White* or that we would have rejected

Judge Posner's analysis in *Bowers* and *Jackson*. *Cf. Capoeman* at 1515-16 discussing *Jones v. Bradley*, 590 F.2d 294. We conclude that it was clearly established by September 1984 that Ostrander's alleged treatment of Wood violated her liberty interest in personal security under the fourteenth amendment. We next consider the question whether Ostrander, as a reasonable police officer, should have known of this clearly established constitutional right. *See Anderson v. Creighton*, 107 S. Ct. at 3039; *Vaughan v. Ricketts*, 859 F.2d at 739.

The answer to this question is compelled by *Ward v. County of San Diego*, 791 F.2d at 1332. There we stated:

> . . . [*Capoeman*] places the responsibility for keeping abreast of constitutional developments in criminal law squarely on the shoulders of law enforcement officials. Given the power of such officials over our liberty, and sometimes even over our lives, this placement of responsibility is entirely proper. Law enforcement officials must be cognizant not only of how far their authority extends, but also of the point at which their authority ends. At the same time, however, we do not read [*Capoeman*] to require of most government officials the kind of legal scholarship normally associated with law professors and academicians. A reasonable person standard adheres at all times.

Id. Ward was decided in 1986. It considered a strip search at a San Diego County jail facility which had occurred in 1981. We noted in *Ward* that by 1984 we had decided *Giles v. Ackerman*, 746 F.2d 614 (9th Cir. 1984), *cert. denied*, 471 U.S. 1053 (1985) in which "we established that strip searches of arrestees for a minor offense are unconstitutional absent individualized suspicion that such arrestee is carrying or concealing contraband or is suffering from a communicable disease." *Ward*, 791 F.2d at 1333. Obviously the jail officials in *Ward*

were not aware of the 1984 *Giles* decision when they strip searched the plaintiff in 1981. But we stated in *Ward* that "[p]re-1981 strip search cases, including *Tinetti*, harbinged our decision in *Giles* . . . ." *Ward* at 1333, referring to *Tinetti v. Wittke*, 479 F. Supp. 486, 490-91 (E.D. Wis.-1979), *aff'd*, 620 F.2d 160 (7th Cir. 1980). The same is true here. Pre-1984 cases, including *White*, harbinged our decision in this case.

We conclude that if Wood establishes at trial the facts which she has stated in support of her section 1983 action, and which we must accept as true at this stage of the case, Ostrander will not be entitled to qualified immunity. A reasonable police officer who acted as Wood alleges Ostrander acted should have understood that what he was doing violated Wood's constitutional right to be free from an unjustified intrusion into her personal security in violation of her liberty interest under the fourteenth amendment. *See Anderson v. Creighton*, 107 S. Ct. at 3039; *White v. Rochford*, 592 F.2d at 384-85 & 387 (Tone, J., concurring).

CONCLUSION

[7] In sum, Wood has raised a genuine factual dispute regarding whether Ostrander deprived her of a liberty interest protected by the Constitution by affirmatively placing her in danger and then abandoning her. If Ostrander acted as Wood claims he did, Ostrander is not entitled to the defense of qualified immunity. Accordingly, the grant of summary judgment in favor of the defendant Ostrander is reversed. We also reverse the summary judgment in favor of Mrs. Ostrander, for the reasons stated in footnote 1, *supra*. The summary judgment in favor of Neil Maloney and his wife is affirmed.

AFFIRMED IN PART, REVERSED IN PART, and **REMANDED** to the district court for further proceedings consistent with this opinion.

CARROLL, District Judge, dissenting:

I disagree with the amended opinion issued following rehearing. The reasons expressed in my prior dissent remain as stated in *Wood v. Ostrander*, 851 F.2d 1212, 1220 (9th Cir. 1988) and as supplemented by further review of the qualified immunity issue. Additional concerns are prompted by two opinions of the United States Supreme Court issued since this matter was reargued on November 23, 1988, *DeShaney v. Winnebago Cty. Soc. Servs. Dept.*, _ U.S. _, 109 S.Ct. 998 (1989) and *Canton v. Harris*, _ U.S. _, 109 S.Ct. 1197 (1989).

The basic (initial) issue to be addressed in this case is whether Ostrander arguably violated Wood's liberty rights under the substantive component of the Due Process Clause. The majority opinion concludes as a matter of law that:

> The fact that Ostrander arrested Bell, impounded his car, and apparently stranded Wood in a high-crime area at 2:30 a.m. distinguishes Wood from the general public and triggers a duty of the police to afford her some measure of peace and safety. *See White v. Rochford*, 592 F.2d at 384 and n. 6 (and authorities cited therein). See also *Chambers-Castenes v. King Co.*, 100 Wash. 2d 275, 669 P.2d 451 (1983); . . . (policy of state to respond to requests for assistance in courteous and judicious manner).[1]

Ergo, the majority opinion concludes, "We are satisfied that Wood has presented genuine issues of material fact on the

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[1]I do not understand the relevance of this State Court opinion to issues in this appeal. The fact that the State of Washington has a policy that police officers should give assistance, etc., to motorists and their passengers would not make violation of that policy a section 1983 violation; neither would it serve to impose liability on the state for its failure to properly train state troopers to effectuate that policy.

question of whether Ostrander deprived her of a liberty interest protected by the Constitution. *See Ingraham v. Wright, supra*; *Haygood v. Younger*, 769 F.2d, at 1356." I do not agree with this conclusion for the reasons stated in this dissent.

The first of two other issues, assuming the Due Process Clause required the State to protect Wood from her unknown assailant, concerns whether Ostrander has the requisite state of mind to make out a due process violation. The amended opinion concludes - post *Canton* - that "Wood has raised a genuine issue of fact tending to show that Trooper Ostrander acted with deliberate indifference to Wood's interest in personal security under the fourteenth amendment." Citing *Taylor v. Ledbetter*, 818 F.2d 791, 793 (11th Cir. 1987) (en banc).

Certiorari has been granted in *Taylor*; the case has been argued and an opinion can issue at any time.[2] While I agree that "deliberate indifference" is the appropriate standard, I believe that the *record*, construed in a manner most favorable to Wood, does not "tend[ ] to show a disregard for Wood's safety amounting to deliberate indifference."

The last issue is whether Ostrander is entitled to a qualified immunity defense. Again, the majority opinion concludes, after a studied analysis:

> [T]hat if Wood establishes at trial the facts she has stated in support of her section 1983 action, and which we must accept as true at this stage of the case, Ostrander will not be entitled to qualified immunity.

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[2]The Supreme Court's decision in *Taylor* may further refine the "special relationship" situations to include children "involuntarily placed in a foster home" as being "analogous to a prisoner in a penal institution and a child confined in a mental health facility." 818 F.2d at 797. This is a far different situation than extending protection of Fourteenth Amendment rights to adult passengers in a vehicle where the driver is arrested.

> A reasonable police officer who acted as Wood alleges Ostrander acted should have understood that what he was doing violated Wood's constitutional right to be free from an unjustified intrusion into her personal security in violation of her liberty interest under the fourteenth amendment. See *Anderson v. Creighton*, 107 S.Ct., at 3039; *White v. Rochford*, 592 F.2d, at 384-85 & 387 (Tone, J., concurring).

For reasons detailed in this dissent, I do not agree that *White v. Rochford*, 592 F.2d 381 (7th Cir. 1979) was "clearly established" law in 1984 with reference to the substantive due process issue in this case. I do not believe that *White* is precedential authority post *DeShaney*, for the proposition that Ostrander "acted with deliberate indifference to Wood's interest in personal security under the fourteenth amendment."

DISCUSSION

1. *Criteria for a Section 1983 Claim under the Substantive Component of the Fourteenth Amendment's Due Process Clause*

I respectfully submit that *DeShaney* is now the controlling authority to determine what are the relevant criteria for determining whether a section 1983 claim is stated under the substantive component of the Fourteenth Amendment's Due Process Clause.

DeShaney, like the case at hand, involved the "substantive rather than the procedural component of the due process clause":

> Joshua [DeShaney] and his mother brought this action under 42 U.S.C. § 1983 in the United States District Court for the Eastern District of Wisconsin against respondents Winnebago County, its Department of Social Services, and various employees of

> the Department. The complaint alleged that respondents had deprived Joshua of his liberty without due process of law, in violation of his rights under the Fourteenth Amendment, by failing to intervene to protect him against a risk of violence at his father's hands of which they knew or should have known.

109 S.Ct., at 1002.

The Supreme Court explained that it granted certiorari in *DeShaney*:

> Because of the inconsistent approaches taken by the lower courts in determining when, if ever, the failure of a state or local governmental entity or its agents to provide an individual with adequate protective services constitutes a violation of the individual's due process rights, see *Archie v. City of Racine*, 847 F.2d 1211, 1220-1223, and n. 10 (CA 7 1988) (en banc) (collecting cases), cert. pending, No. 88-576, and the importance of the issue to the administration of state and local governments, ...

Id., at 1002.

The Supreme Court first outlined why it is that a state is not "categorically obligated" to protect a person from private violence:

> But nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without 'due process of law,' but its lan-

guage cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means. Nor does history support such an expansive reading of the constitutional text. Like its counterpart in the Fifth Amendment, the Due Process Clause of the Fourteenth Amendment was intended to prevent government 'from abusing [its] power or employing it as an instrument of oppression' . . . . Its purpose was to protect the people from the State, not to ensure that the State protected them from each other. The Framers were content to leave the extent of governmental obligation in the latter area to the democratic political processes.

Consistent with these principles, our cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual. [citations omitted] . . . If the Due Process Clause does not require the State to provide its citizens with particular protective services, it follows that the State cannot be held liable under the Clause for injuries that could have been averted had it chosen to provide them. [footnote omitted]. As a general matter, then, we conclude that a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause.

109 S.Ct., at 1003-4.

The Court went on to discuss Petitioners' contention that a "duty" to provide "adequate protective services" arises out of " 'special relationships' created or assumed by the State with respect to particular individuals." Petitioners argued that such a "special relationship" existed in *DeShaney*

"because the State knew that Joshua faced a special danger of abuse at his father's hands, and specifically proclaimed by word and by deed its intention to protect him against that danger." Petitioners then argued that "Its [the State's] failure to discharge that duty, . . . was an abuse of governmental power, that so 'shocks the conscience', *Rochin v. California*, 343 U.S. 165, 172 (1952), as to constitute a substantive due process violation."

The Opinion observes (n. 4) that "The genesis of this notion [a special relationship] appears to lie in a statement in our opinion in *Martinez v. California*, 444 U.S. 277 (1980). In that case, we were asked to decide, *inter alia*, whether state officials could be held liable under the Due Process Clause of the Fourteenth Amendment for the death of a private citizen at the hands of a parolee. Rather than squarely confronting the question presented here - whether the Due Process Clause imposed upon the State an affirmative duty to protect - we affirmed the dismissal of the claim on the narrower ground that the causal connection between the state officials' decision to release the parolee from prison and the murder was too attenuated to establish a 'deprivation' of consitutional rights within the meaning of § 1983."

In this same footnote (n. 4) the Court commented that several Courts of Appeal have read the statement in *Martinez*:

> [T]he parole board was not aware that appellants' decedent, as distinguished from the public at large, faced any special danger. We need not and do not decide that a parole officer could never be deemed to 'deprive' someone of life by action taken in connection with the release of a prisoner on parole.

"as implying that once the State learns that a third party poses a special danger to an identified victim and indicates its willingness to protect the victim against danger, a 'special relationship' arises between State and victim, giving rise to an

affirmative duty, enforceable through the Due Process Clause, to render adequate protection." The *DeShaney* opinion makes it clear that this construction of *Martinez* is overbroad.

The Supreme Court flatly rejected petitioners arguments in *DeShaney* and impliedly the Circuit Court opinions relying on similar arguments. (*Balistreri v. Pacifica Police Dept.*, 855 F.2d 1421, 1425-26 (CA9 1988), (a special relationship case), was one of the Circuit Court opinions referenced in this regard). The Supreme Court cited its prior opinions to illustrate why it is "that in certain limited circumstances the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals," i.e., "adequate medical care to incarcerated prisoners;" services to "involuntarily committed mental patients . . . as are necessary to ensure their 'reasonable safety' from themselves and others," and "medical care to suspects in police custody who have been injured while being apprehended by the police." The Court then noted:

> But these cases afford petitioners no help. Taken together, they stand only for the proposition that when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume responsibility for his safety and general well-being.

109 S.Ct., at 1005. The Court goes on to hold:

> The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf. [Citation omitted]. In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to of personal liberty - which is the 'deprivation

> of liberty' triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harm inflicted by other means.

Id., at 1006.

After its discussion of *Estelle v. Gamble*, 429 U.S. 97 (1976) and *Youngberg v. Romero*, 457 U.S. 307 (1982), the *DeShaney* Court said:

> The *Estelle-Youngberg* analysis simply has no applicability in the present case. Petitioners concede that the harms Joshua suffered did not occur while he was in the States's custody, but while he was in the custody of his natural father, who was in no sense a state actor. [footnote omitted]. While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it render him any more vulnerable to them. That the State once took temporary custody of Joshua does not alter the analysis, for when it returned him to his father's custody, it placed him in no worse position than that in which he would have been had it not acted at all; the State does not become the permanent guarantor of an individual's safety by having once offered him shelter. Under these circumstances, the State had no constitutional duty to protect Joshua.

Id.

Here, Wood was never in the State's custody. The person from whom Wood accepted a ride and who allegedly raped her was not a state actor. Assuming the State was aware of the speculative dangers that Wood faced or of any of her alleged circumstances concerning money, or the inability to call anyone to pick her up, or the distance she had to walk, the State played no part in their creation. Neither did the State render

her more vulnerable than any other member of the general public in that area, whether walking about, standing by the side of the road, or going to or from one of the nearby 24-hour business establishments.

The State patently did not become the guarantor of Wood's safety when it arrested the drunken driver of the car in which she was riding. How could any reasonable police officer be aware that in not escorting Wood home, or taking her to a location she requested, he was violating her "consitutional right to be free from an unjustified intrusion into her personal security in violation of her liberty interest under the fourteenth amendment." This proposition is the most attenuated of claimed "special relationships," and cannot pass constitutional muster. Consistent with *DeShaney*, the State owed no constitutional duty to Wood.

The Amended Opinion continues to rely on *White v. Rochford*, 592 F.2d 381, 385 (7th Cir. 1979), after *DeShaney*. Thus *White* is cited for the proposition that "gross negligence or reckless disregard for the safety of others" is cognizable under section 1983; as well as supporting the majority's conclusion "that Ostrander having arrested Bell, impounded his car, and apparently stranded Wood in a high-crime area at 2:30 a.m. distinguishes Wood from the general public and triggers a duty of the police to afford her some measure of peace and safety." This latter proposition - a special relationship contention - is totally inconsistent with the legal principles enunciated so clearly in *DeShaney*.

Justice Brennan recognizes that the majority opinion in *DeShaney* is contrary to *White*.[3] Thus, he states in his dissent:

> Cases from the lower courts also recognize that a State's actions can be decisive in assessing the con-

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[3]Justice Brennan also cited *White* in his dissenting opinion (n. 3) in *Davidson v. Cannon*, ___ U.S. ___, 106 S.Ct. 668, 674 (1986).

> stitutional significance of inaction. For these purposes, moreover, actual physical restraint is not the only State action that has been considered relevant. See, e.g., *White v. Rochford*, 592 F.2d 381 (CA7 1979) (police officers violated due process when, after arresting the guardian of three young children, they abandoned the children on a busy stretch of highway at night).

106 S.Ct., at 1008.

The Amended Opinion's *only* reference to *DeShaney* is as follows:

> Wood has raised a triable issue of fact as to whether Ostrander's conduct 'affirmatively placed the plaintiff in a position of danger.' *Ketchum*, 811 F.2d at 1247; See *Jackson v. City of Joliet*, 715 F.2d at 1204 (distinguishing situation where arrest creates the danger, actionable under section 1983, from situation where danger existed before defendant acted); see also *DeShaney v. Winnebago Cty. Soc. Servs. Dept.*, _ U.S. _, 109 S.Ct. 998, 1006 (1989), distinguishing situation where state 'played no part' in creating the dangers that minor child faced by remaining in his father's custody 'nor did [the state] do anything to render [the child] any more vulnerable to them').

The limited quotes from *DeShaney* were not decisive to that opinion. This is readily apparent when it is recalled that the State had in fact taken custody of the child and thereafter "returned him to his father's custody," while having knowledge of the father's abusive character. Nonetheless, the Supreme Court found that these circumstances were not "sufficiently analogous to incarceration or institutionalization to give rise to an affirmative duty to protect." 109 S.Ct., at 1006, n. 9.

To repeat, the State did not create the unknown dangers, whatever they were, that Wood faced when she decided to accept a ride from a stranger rather than choose one of the other options that were available to her.[4]

The statement in the Amended Opinion, n. 6, that it "does not foreclose Wood from attempting to show at trial [as a violation of a consitutional right to substantive due process] that Ostrander's treatment of her was such that it 'shocks the conscience,'" appears to offend the plain holding of *DeShaney*, wherein it rejected a similar argument. See also Comment, *Substantive Due Process Analyses of Non-legislative State Action, A Case Study*, 1980 Brig. Yg. L. Rev. 347. In discussing *White v. Rochford*, - the case under study - the writer anticipated *DeShaney* when he concludes:

> *Rochin* was not a substantive due process case at all. Its rationale and holding dealt strictly with the procedural guarantees of the due process clause; 'shocks the conscience' test to which the Rochin decision gave birth had nothing whatsoever to do with defining an independent and absolute right, as the Court in *White* apparently assumed. The liberty interest at stake in *Rochin* was liberty in its classical sense. It was an interest in freedom from physical restraint, a freedom deprived in that case as a result of criminal conviction and incarceration. The *Rochin* opinion was simply addressed to the question of whether the conviction was obtained by methods satisfying 'due process of law.'

Id. at 369.

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[4]The area where Wood's companion was arrested is a well-lighted thoroughfare in a commercial district. Two retail businesses in the immediate vicinity were open and lighted.

II. *The Requisite - "State of Mind" to make out a Due Process Violation*

The amended opinion asserts in an arguendo fashion that if "reckless or gross negligence" is not sufficient to state a section 1983 claim - as concluded in the original opinion, based on dictum in *Ketchum v. County of Alameda*, 811 F.2d 1243 (9th Cir. 1987) - then "Wood has raised a genuine issue of fact tending to show that Trooper Ostrander acted with deliberate indifference to Wood's interest in personal security under the fourteenth amendment." The opinion does not explicate how it is that the character of Wood's version of the case has changed after rehearing from "reckless or gross negligence" to "deliberate indifference."

III. *Qualified Immunity*

I believe it is unnecessary to consider whether Ostrander is entitled to a qualified immunity defense, given that the Due Process Claim does not require the State to protect Wood from her unknown assailant. *DeShaney, Id.*

Assuming for discussion purposes that *DeShaney* does not moot this issue, I would affirm the District Court's determination that a "special relationship" was not created in a constitutional sense between the State and Ms. Wood under the circumstances present during the early morning hours of September 23, 1984, and the District Court's further conclusion that Ostrander was entitled to qualified immunity:

> Wood was an adult female, admittedly able to exercise the independent judgment of an ordinary adult. She was left within walking distance of two open businesses where she could seek help. In this case the State had not affirmatively committed itself to protecting this class of persons. The state at the time of the indictment had no guidelines requiring the safekeeping of passengers of arrestees. In this

> case, it cannot be said that the state knew of Wood's plight. This is not the type of case where the state had knowledge of a particular madman who was likely to prey on Wood. The plaintiff alleges that this particular area is a high-crime area. To hold that the trooper had a duty of protection on that basis would be to create an affirmative constitutional duty of protection, in essence, to the public as a whole. This court declines to do so. Ostrander was unaware of whether or not she had money available to seek help. Thus, even assuming that an officer in 1984, through some crystal ball analysis, could foresee the analytical approach suggested by the Ninth Circuit in 1986, a special relationship was not created. At the time of the incident Ostrander's conduct did not violate a clearly established constitutional right. Ostrander is entitled to qualified immunity from suit for civil damages. (ER 54, p. 9).

The standard of qualified immunity outlined in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), entitles a public official to immunity so long as his actions do not violate a clearly established statutory or constitutional right about which a *reasonable person* would have known.

This defense is a matter of consequence to public officials at every level of government. It allows them to exercise their discretion in situations where claimed rights have not been clearly established, and to act "with independence and without fear of consequences." *Pierson v. Ray*, 386 U.S. 547, 554 (1967).

Qualified immunity is an entitlement not to stand trial under certain circumstances or to be burdened with broad reaching and costly pretrial discovery. *Mitchell v. Forsyth*, 472 U.S. 511 (1985):

> "The entitlement is an *immunity* from *suit* rather than a mere defense to liability; and like an absolute

> immunity, it is effectively lost if a case is erroneously permitted to go to trial." 472 U.S. at 526.

Resolution of this issue is encouraged on summary judgment; a denial of the defense, to the extent it turns on an issue of law, is a final decision which may be reviewed by way of an interlocutory appeal. *Id.*, at 530. Qualified immunity is a fact specific determination.

This "important question" was revisited in *Anderson v. Creighton*, 107 S.Ct. 3034, 3038 (1987). In *Anderson* the Court of Appeals for the Eighth Circuit had determined that a police officer was not entitled to summary judgment on qualified immunity grounds, "since the right [he] was alleged to have violated - the right of persons to be protected from warrantless searches of their homes unless the searching officers have probable cause and there are exigent circumstances - was clearly established." *Id.*

Justice Scalia, writing for the majority in *Anderson*, after giving an overview of the breadth of the qualified immunity defense, e.g., it "protects 'all but the plainly incompetent or those who knowingly violate the law,' " concluded:

> Somewhat more concretely, whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action. *Harlow*, 457 U.S., at 819, 102 S.Ct., at 2739, assessed in light of the legal rules that were 'clearly established' at the time it was taken, *id.*, at 818, 102 S.Ct., at 2738.

107 S.Ct., at 3038.

Anderson goes on to explain why the claimed violation of a broad general constitutional principle is not the kind of "clearly established law" upon which a damage claim can rest:

The operation of this standard, however, depends substantially upon the level of generality at which the relevant 'legal rule' is to be identified. For example, the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right. Much the same could be said of any other constitutional or statutory violation. But if the test of 'clearly established law' were to be applied at this level of generality, it would bear no relationship to the 'objective legal reasonableness' that is the touchstone of *Harlow*. Plaintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights. *Harlow* would be transformed from a guarantee of immunity into a rule of pleading. Such an approach, in sum, would destroy 'the balance that our cases strike between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties,' by making it impossible for officials 'reasonably [to] anticipate when their conduct may give rise to liability for damages.' *Davis*, 468 U.S., at 195, 104 S.Ct., at 3019. [footnote omitted]. It should not be surprising, therefore, that our cases establish that the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, see *Mitchell*, 472 U.S., at 535, n. 12, 105 S.Ct. at 2820, n. 12; but it is to say that in the light of preex-

> isting law the unlawfulness must be apparent. See, e.g., *Malley, supra,* 475 U.S., at 344-345, 106 S.Ct., at _ - _; *Mitchell, supra,* 472 U.S., at 528, 105 S.Ct., at 2816; *Davis, supra,* 468 U.S., at 191, 195, 104 S.Ct., at 3017, 1019.

Id., at 3038-39.

In *Ward v. County of San Diego,* 791 F.2d 1329 (9th Cir. 1986), this Court discussed the qualified immunity defense and its application under *Harlow* and *Capoeman v. Reed,* 754 F.2d 1512 (9th Cir. 1985):

> We first note that *Capoeman* places the responsibility for keeping abreast of constitutional developments in criminal law squarely on the shoulders of law enforcement officials. Given the power of such officials over our liberty, and sometimes even over our lives, this placement of responsibility is entirely proper. Law enforcement officials must be cognizant not only of how far their authority extends, but also of the point at which their authority ends. At the same time, however, we do not read *Capoeman* to require of most government officials the kind of legal scholarship normally associated with law professors and academicians. A reasonable person standard adheres at all times.

791 F.2d, at 1332.

On September 23, 1984, *White v. Rochford,* 592 F.2d 381 (7th Cir. 1979), was the one and only case in all American jurisprudence holding - even inferentially - that an arresting officer owed a duty to passengers (children) in a car "to conduct an arrest in such a manner that the children's interest in personal security was not infringed." (concurring opinion, *Id.* at 388).

The first question to be answered is what legal rules were expressed in *White* and were they "clearly established" by that opinion so that a reasonable police officer would understand that the " 'law clearly proscribed the actions' " he took. *Anderson*, at 3038.

The majority opinion admonishes here that:

> The immunity standard considers whether a reasonable law enforcement officer should view the *White* case as controlling. Given this element of reasonableness, the qualified immunity regime of clearly established law should not be held to allow section 1983 defendants to interpose lawyerly distinctions that defy common sense in order to distinguish away clearly established law . . .

One is left to wonder who - if not the lawyers - will speak for these reasonable police officers in attempting to persuade a court whether a proposition is or is not clearly established law.

In the final analysis, *White* must be considered in its totality, as it might be understood by a reasonable police officer, and not, I submit, as the majority opinion has done, by excerpting seven words from the one judge lead opinion in *White* by Judge Sprecher and eleven words from the partially concurring opinion of Judge Tone ("I agree in part, but not in all respects, with Judge Sprecher's reasons for reversal of the judgment as to the police officer defendants, and am therefore stating separately my reasons for concurring in that action." *Id.*, at 386). Consideration is also required of Judge Kilkenny's dissenting opinion ("The majority, by implication, imagination, or otherwise paints a picture which finds no support in the record. The cases do not fit our facts." *Id.*, at 392). It is evident that there are a variety of judgments that a reasonable police officer could reach after reviewing these three opinions.

The fact that the majority here believe that "It defies common sense to find a meaningful legal distinction between dangers facing children crossing a busy highway and a woman left alone to fend for herself at 2:30 a.m. in a high crime area," does not require that a reasonable police officer would have so concluded after reading *White* - he might well be uncertain whether the rationale of the lead and concurring opinions extended only to children passengers, or to any passengers.[5]

Judge Sprecher's opinion was obviously prompted by the fact that the passengers were minor children who had been deprived of the adult protection of their custodian. It would unduly extend this dissent to incorporate Judge Sprecher's extensive statements in this regard, or to include his references to state statutes concerning duties owed minor children by persons responsible for their custody. Suffice it to say that his statement of the issue presented on appeal illustrates what his concerns were:

> The issue presented by this case is whether police officers may, with constitutional impunity, abandon children and leave them in health-endangering situations after having arrested their custodian and thereby deprived them of adult protection. We hold that they may not, and accordingly, we reverse the district court's dismissal of a complaint alleging such facts and remand for trial.

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[5]I do not agree that *White* was correctly decided on a constitutional basis. I believe, however, that there are meaningful legal distinctions between duties which law enforcement officers may owe to minor children and an adult when they arrest the driver of a car in which they are riding. I also believe that the dangers facing the minor children in *White* were immediate and apparent, whereas any dangers facing Wood were speculative, conjectural and subject to her control. The injury which she claims to have suffered could have occurred to any woman accepting a ride from a stranger at any hour of the day in any community.

592 F.2d, at 382.

Although Judge Tone did not concur in all respects with Judge Sprecher's reasons for reversal, his concurring opinion could justifiably cause a reasonable police officer to believe that the minor children's custodial status was a controlling principle in the case:

> In the case at bar the children in the car had a federally protected right to be free from the unjustified intrusions on their personal security by the police. Their personal security was under the protection of their uncle. If that protection was removed and no alternative protection was provided, they would be exposed to danger as occupants of an immobilized car on a highspeed expressway and to the cold. Arresting the uncle and thus removing their protection, and yet leaving the children exposed to these hazards, was an unjustified intrusion on the children's personal security.

Id., at 387.

Just as the police officers are not held to the standards of legal scholars, neither should they be expected to analyze and parse an opinion (that they never heard of) utilizing the legal skills and reasoning of an appellate judge.

The opinions that cited *White* prior to September 1984, either distinguished the case from the one being decided (*Williams v. City of Boston*, 599 F. Supp. 363, 367 (D. Mass. 1984) (No liability for a student injured at a football game scheduled in a high crime area. The Court held the plaintiff "was no more foreseeable victim of harm than any other person in attendance at the football game . . . Furthermore, as in *Martinez*, the causal connection between the defendants' acts and the plaintiff's injury is too tenuous to impose § 1983 liability."); cited it for the proposition that gross or reckless

conduct in a situation that would otherwise be simple negligence was sufficient to state a § 1983 claim, (e.g., *Means v. City of Chicago,* 535 F. Supp. 455 (N.D. Ill. 1982); or that mental or emotional distress may be compensable under § 1983, (*James v. Bd. of Sch. Com'rs of Mobile County, Ala.,* 484 F. Supp. 705, 714 (S.D. Ala. 1979). *See also* other cites: *Coyne v. Boeckmann,* 511 F. Supp. 667, 669 (E.D. Wisc. 1981) (coerced confession from a 17 yr. old); *Seide v. Prevost,* 536 F. Supp. 1121, 1125 (S.D. N.Y. 1982) (state responsibility for committed and uncommitted disturbed persons); *Larson v. Wind,* 536 F. Supp. 108 (N.D. Ill. 1982) (medical assistance for person in police custody); *Arko v.Broom,* 518 F. Supp. 669 (D. Colo. 1981 (police officers exposed to dangerous or addictive drugs); *Wedgeworth v. Harris,* 593 F. Supp. 155 (W.D. Va. 1984) (sexual assault by a police officer).

At best, *White* is a "special relationship" case - dealing with a police officer and minor children in an unusual situation. The Seventh Circuit recognized that fact in *Ellsworth v. City of Racine,* 774 F.2d 182, 195 (7th Cir. 1985), when it noted:

> "Indeed, we have held that: the constitution creates a duty on the part of police officers to protect minor children from immediate hazards after police officers arrest the children's guardians. *White v. Rochford,* . . . ."

One further statement in *Ellsworth* is pertinent:

> "The contours of what constitutes a 'special relationship' between a municipality, acting through its officials, and its citizens are hazy and indistinct. We have tried to lend clarity to the concept when faced with the facts presented by individual cases." *Id.,* at 185.

That is what occurred in *White* when the Court considered the facts presented in that individual case. Could anyone

fairly conclude that the *White* court would have found the same "constitutional" violation if Ms. Wood had been the passenger left sitting in the car on the Chicago Skyway, rather than the minor children? I submit not.

The Precedential Effect of White in this Circuit

In light of the conclusions I reach regarding *DeShaney* and the fact that *White* does not identify a "clearly established" constitutional right allegedly violated by Ostrander, it is not necessary to address the majority opinion's conclusion that "it was likely in September, 1984 the Ninth Circuit would have come to the same result as the Seventh Circuit did in *White*."

I do not understand, however, how the majority opinion reaches this conclusion without addressing the concerns expressed by Judge Kilkenny in his dissent. (592 F.2d, at 388-395). I say this not because Judge Kilkenny is a long time Ninth Circuit Judge, but rather because of his thoughtful critique of the other two opinions, as well as his analysis of opinions relied on by Judges Sprecher and Tone:

> "The authorities cited by appellants are wide of the mark. In no way do they support appellants' principal claims that they were deprived of their constitutional rights to liberty, non-interference with family affairs or freedom to travel in interstate commerce." *Id.*, at 397.

With respect to the "liberty" interest issue, Judge Kilkenny observed:

> The majority, by implication, imagination, or otherwise paints a portrait which finds no support in the record. The cases cited do not fit our facts. These cases involve state or governmental agency action directed at a particular person whom the agency or

> officer has either taken into custody or over whom they have asserted responsibility. Nowhere does the majority face up to the distinction which I make as to the duty owed to the uncle, once arrested, and the absence of duty to the children against whom no action was taken.

Id., at 392.

Judge Kilkenny also foresaw the *DeShaney* holding when he said "[n]o authority is cited by either member of the majority which would place the actions of the officers in the instant case in violation of the second aspect of the Due Process Clause's protection, i.e., that their action 'shocks the conscience.' This is just a wishful way of attempting to create a constitutional remedy where none exists." *Id.*, at 393.

Under *Capoeman* this court would have considered the law review comment in 1980 Brig. Yg. L. Rev. 347, referenced earlier in my dissent. The Comment's conclusion, captioned "A Constitutional Misstep," is particularly insightful:

> In *White v. Rochford,* the Seventh Circuit's conclusion that the offending policeman had deprived the plaintiff children of constitutional rights seem to follow emotional impulses more closely than it follows acceptable principles of due process analysis. The court gave only incomplete reference to appropriate case law, it refused to consider even the relevance of procedural questions, and it failed to note the special relevance that the recent Supreme Court decision in *Ingraham v. Wright* gave to the availability of independent causes of action under Illinois law. In so doing, the court successfully, even if perhaps not purposefully, avoided the balancing that has been commonly used to resolve due process conflicts between nonlegislative state action and consti-

tutionally protected, but less than fundamental, personal interests.

The *White* decision's uniquely substantive approach to the due process issue evidences only an attempt to arrive at a 'just' result based on the appellate court's independent evaluation of the officers' alleged actions. The final judicial product is one that is blatantly inconsistent with evident Supreme Court policy that the due process clause is not a valid source of general federal tort liability. If the Seventh Circuit had good reasons to circumvent this policy, it could have masked its efforts more effectively. The holding in *White* could have been at least more clearly reasoned, even if not more solidly based, had it been decided on grounds of procedural insufficiency in the police officers' actions.

Substantive due process analysis has not disappeared from judicial decision making, but the trend, which should continue, has been to carefully limit its scope. Courts that are inclined to adopt a purely substantive approach toward nonregulatory types of state action similar to that challenged in *White* should first insure that the rights involved are within the scope of 'fundamentals' that find solid root in specific constitutional language or values. The Seventh Circuit's failure to do so in *White v. Rochford* resulted in an obviously superficial analysis, wanting for necessary procedural considerations and balance.

1980 Brig. Yg. L. Rev., at 374-75.

In deciding whether this circuit would have followed *White* in 1984, one must look at opinions of the United States Supreme Court as they exist today. I know of no case that holds a state official liable for conduct violative of the consti-

tution when it occurred but no longer violative at the time the decision is being made. *White*, whatever its status in 1984, does not survive *DeShaney* as precedential authority for a claimed special relationship duty.

Otherwise, I will leave for others to ultimately decide whether the majority correctly concludes that *White* was "clearly established" law and that it would have been followed in this Circuit in 1984. I suggest to the contrary on each proposition. *Capoeman* took a cautious view in a situation where several circuits had issued opinions on the point at issue - and appropriately found that there was uncertainty as to what would have been done in the Ninth Circuit. To take a contrary position on the basis of one opinion - and particularly of the uncertainty of *White* - would effectively void the qualified immunity defense for public officials and it would become but a barmecidal doctrine. Not only would a public official in the Ninth Circuit be charged with knowledge of Ninth Circuit precedent, but would be charged with knowledge of cases cited in opinions which were cited in Ninth Circuit opinions.[6]

Conclusion

The State of Washington holds its police officers responsible for actions of the type alleged in this case. It was appropriate for the state to make that decision. State tort law is the arena within which to develop the procedures an officer should follow in deciding whether to offer assistance to a passenger and how that assistance should then be provided. It requires little prescience to anticipate the kind of disputes that will be generated in these instances concerning what was told the officer; mode of dress; weather forecasts; the crime

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[6] *White* was first cited in this Circuit in *Balestreri v. Pacifica Police Dept.*, 855 F.2d 1421 (9th Cir. 1988) (submitted without argument on March 16, 1988 and the opinion issued August 23, 1988). Interestingly, *Balestreri* does not cite *Wood*, which was originally decided July 13, 1988.

rate at the arrest scene and environs; where the passenger wanted to be transported, etc. Like *DeShaney* and *White* (Judge Kilkenny's dissent), officers will undoubtedly be faced with charges of false arrest, sexual harassment and assaults as they attempt to meet whatever burdens are imposed on them in the absence of state regulations spelling out procedures to be followed. Those are not problems to be addressed under the Due Process Clause of the Fourteenth Amendment.

APPENDIX B

OPINION

FLETCHER, Circuit Judge:

Linda Wood brought this action against Washington State Trooper Steven Ostrander and others for damages under 42 U.S.C. § 1983. Wood appeals the district court's dismissal on summary judgment. We reverse.

FACTS

At 2:30 a.m., in the morning of September 23, 1984, Trooper Ostrander pulled a car to the side of the road for driving with its high beams on. Ostrander determined that the driver, Robert Bell, was intoxicated and placed him under arrest. Ostrander called for a tow truck to have the car impounded, and returned to the car and removed the keys. Wood, who was sitting in the car, asked Ostrander how she would get home. Ostrander replied that he was sorry, but that Wood would have to get out of the car. These facts are not disputed. Wood claims that Ostrander simply returned to his patrol car and drove away. Ostrander claims that he offered to call a friend or family member who could give Ms. Wood a ride home, but that she declined the offer. Although Wood claims that she did not see any open business at the time Ostrander drove away, Ostrander claims that a Shell station and a Seven-Eleven store were clearly visible and open for business. Ostrander further claims that Wood was picked up by an unknown driver before Ostrander drove away, though Bell and Wood dispute this.

Ostrander left Wood near a military reservation in the Parkland area of Pierce County, which has the highest aggravated crime rate in the County outside the City of Tacoma. The temperature was 50 degrees and Wood was wearing only a blouse and jeans. After walking one half block towards her home, which was five miles away, and having turned down rides offered by three or four strangers, Wood accepted a ride

with an unknown man. The driver took Wood to a secluded area and raped her.

Wood had little or no money on her person at the time. Although she lived with her parents, Wood did not try to call them for help because, she claims, they would have been unable to pick her up: her mother has night-blindness and her step father suffers from brain damage.

The district court denied defendants' first summary judgment motion, ruling that Ostrander's actions could not be characterized as merely negligent. Subsequently, the district court granted defendants' second motion for summary judgment, on the ground that Ostrander was entitled to good faith, qualified immunity, and that Ostrander owed no "affirmative constitutional duty of protection" to Wood.[1]

We review the district court's grant of summary judgment de novo to determine whether there is any genuine issue of material fact and whether the substantive law was correctly applied. *Darring v. Kincheloe,* 783 F.2d 874, 876 (9th Cir. 1986). All facts in the record and inferences drawn from them must be viewed in the light most favorable to the non-moving party. *Clipper Exxpress v. Rocky Mountain Motor Tariff,* 690 F.2d 1240, 1250 (9th Cir. 1982).

DISCUSSION

I. *Whether Wood has stated a § 1983 claim*

[1] To sustain an action under § 1983, a plaintiff must show

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[1]The district court did not rule on defendants' argument that the damages claim should be dismissed on proximate cause grounds. Although this court could presumably affirm on that basis if it had legal merit and factual support in the record, *see, e.g., Lee v. United States,* 809 F.2d 1406, 1408 (9th Cir. 1987), defendants have not raised the proximate cause argument on appeal. We have not examined its merits.

(1) that the conduct complained of was committed by a person acting under color of state law; and (2) that the conduct deprived the plaintiff of a federal constitutional or statutory right. *Rinker v. Napa County,* 831 F.2d 829, 831 (9th Cir. 1987) (citing *Parratt v. Taylor,* 451 U.S. 527, 535 (1981)). Defendants do not dispute that in arresting Bell and impounding the car, Ostrander was acting under color of state law. They do, however, argue that Wood fails to state a claim cognizable under § 1983 because, first Ostrander's conduct at most negligent and, second, Wood has adequate state remedies to pursue her claim. These distinct threshold issues are considered in turn.

A. *The "mere negligence" bar*

[2] In *Daniels v. Williams,* 474 U.S. 327, 330-32 (1986), and *Davidson v. Cannon,* 474 U.S. 344, 347 (1986), the Supreme Court held that mere negligence or lack of due care by state officials does not trigger the protections of the Fourteenth Amendment and therefore does not state a claim under § 1983. In doing so, the Court overruled that part of *Parratt,* 451 U.S. at 536-37, which held that a negligent loss of property by state officials could be a "deprivation" under the Due Process Clause. *Daniels,* 474 U.S. at 330. However, the Court expressly left open the question of "whether something less than intentional conduct, such as recklessness or gross negligence, is enough to trigger the protections of the Due Process Clause." *Id.* at 334 n.3.

This question has since been addressed by several courts of appeal. In *Ketchum v. Alameda Co.,* 811 F.2d 1243 (9th Cir. 1987), this court stated that *Daniels* did not control the resolution of a § 1983 case claiming state liability for third-party crimes, where the plaintiff had alleged gross negligence by the state. 811 F.2d at 1244, 1246 n.3. Other circuits have held recklessness or gross negligence sufficient to state a § 1983 claim, whereas none has held that only intentional misconduct will suffice. *See, e.g., Taylor v. Ledbetter,* 818 F.2d 791,

793 (11th Cir. 1987)(en banc), *cert. granted,* 108 S.Ct. _ (1988)(claim that state officials "were 'grossly negligent' or 'deliberately indifferent' " is "sufficient to overcome either a *Daniels* or *Davidson* bar"); *Vinson v. Campbell County Fiscal Court,* 820 F.2d 194, 199-200 (6th Cir. 1987)(gross negligence cognizable under § 1983); *White v. Rochford,* 592 F.2d 381, 385 (7th Cir. 1982) (gross negligence or reckless disregard for the safety of others is cognizable); *see also Davidson v. O'Lone,* 752 F.2d 817, 828 (3rd Cir. 1984)(en banc), *aff'd sub nom., Davidson v. Cannon,* 474 U.S. 347 (1986)(gross negligence or reckless indifference sufficient)(plurality view).[2]

[3] In this case, Wood has raised genuine issues of fact tending to show that Trooper Ostrander had acted with gross negligence, recklessness, or "deliberate indifference" to Wood's safety. *See Taylor v. Ledbetter,* 818 F.2d at 793, 795-97 (deliberate indifference to victim's well-being is more than negligence and supports § 1983 claim); *Davidson v. O'Lone, supra,* 752 F.2d at 828; *see also Estelle v. Gamble,* 429 U.S. 97 (1976) (prison officials' deliberate disregard of prisoner's serious illness or injury violates Eighth Amendment and is cognizable under § 1983). The rationale underlying *Daniels*' bar of negligence-based § 1983 claims is that mere lack of due care, such as leaving a pillow on the prison stairs (*Daniels*) or mislaying an inmate's property (*Parratt*) is "quite remote" from the Fourteenth Amendment's purpose of redressing abuses of power by state officials. 474 U.S. at 332. Here, the facts put in issue by Wood—that Ostrander arrested the driver, impounded the car, and left Wood by the side of the road at night in a high-crime area—show an intentional assertion of government power which, according to Wood's version of the

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[2] *Jackson v. City of Joliet,* 715 F.2d 1200, 1206 (7th Cir. 1983), is not *contra.* There, the court found that a grossly negligent rescue attempt was not actionable under § 1983 where the plaintiff's decedents were already trapped in a burning car when the police arrived. The court expressly distinguished cases in which the state officials' actions created the danger or created a special duty of protection toward the plaintiff. *See id.* at 1204-05.

case, tends to show a disregard for Wood's safety that may amount to more than negligence. Even in *Davidson v. Cannon*, although the injury to the plaintiff was also very serious, the officials' acts and omissions were not deliberate, as Ostrander's allegedly were; rather, as characterized by the Court, the acts in *Davidson* were no more than negligent oversight. 474 U.S. at 347. Ostrander's actions allegedly involve an element of abuse of power, and his conduct may be more than mere negligence. Wood's claim is not barred by *Daniels*.

B. *The "state remedies" bar*

[4] *Parratt v. Taylor*, 451 U.S. at 541-44, and its progeny hold that a deprivation of liberty or property is not cognizable under § 1983 when a state's post-deprivation remedies are adequate to protect a victim's procedural due process rights. *See, e.g., Hudson v. Palmer*, 468 U.S. 517, 533 (1983).[3] However, "[t]he *Parratt* line of cases does not focus on the relevance of procedural protections to alleged violations of *substantive* constitutional rights." *Smith v. City of Fontana*, 818 F.2d 1411, 1414 (9th Cir. 1987), *cert. denied*, 108 S.Ct. 311 (1988). Accordingly, the existence of state remedies is irrelevant and the *Parratt* bar inapplicable where the plaintiff alleges a violation of a substantive right under either the Bill of Rights or the Due Process Clause. *Smith*, 818 F.2d at 1415; *accord Mann v. Tucson Dept. of Police*, 782 F.2d 790, 792-93 (9th Cir. 1986)(per curiam); *see also Daniels*, 474 U.S. at 337-39 (Stevens, J., concurring); *Parratt*, 451 U.S. at 545 (Blackmun, J., concurring); *Haygood v. Younger*, 769 F.2d 1350, 1356 (9th Cir. 1985)(en banc)(*Parratt* and *Hudson* "did not deal with official assaults, batteries or other invasions of personal liberty").

[4] Defendants argue that the existence of a state tort remedy for Wood precludes the § 1983 claim under *Parratt*. According to defendants, the only distinction between this

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[3]This aspect of *Paratt* was not overruled by *Daniels*.

case and the *Parratt* line is that *Parratt* and its progeny involve deprivations of property whereas this case involves an alleged deprivation of liberty. *See Ingraham v. Wright*, 430 U.S. 651, 674-75 (1977)(child had liberty interest in personal security and freedom from restraint and infliction of pain). Defendants argue that we should anticipate a Supreme Court holding to the effect that *Parratt* extends to deprivations of liberty, because the Court cited certain § 1983 cases involving assaults to support its conclusion that *Parratt* extends to intentional deprivations of *property*. *See Hudson v. Palmer*, 468 U.S. at 531 n.10, 533-34 n.14. Defendants also rely on this court's decision in *Rutledge v. Arizona Board of Regents*, 660 F.2d 1345, 1352 (9th Cir. 1981), *aff'd sub nom. Kush v. Rutledge*, 460 U.S. 719 (1983), which held in part that a college football coach's assault on a player was not cognizable under § 1983.

[5] Defendants' argument is unpersuasive, because it follows the wrong axis of analysis. This circuit has analyzed *Parratt* and its progeny not by distinguishing liberty versus property deprivations, but rather by analyzing substantive versus procedural rights deprivations. *See, e.g., Smith v. City of Fontana*, 818 F.2d at 1414-15. The relevant inquiry is whether the deprivation is sufficiently serious that " 'the constitutional line ha[s] been crossed' so as to constitute a deprivation of substantive due process." *Rutherford v. City of Berkeley*, 780 F.2d 1444, 1447 (9th Cir. 1986). *Ingraham* and *Rutledge* do not suggest otherwise. In *Ingraham*, the Court considered only a procedural due process challenge based on the lack of a hearing before corporal punishment was meted out. *See* 430 U.S. at 674, 680-83. In *Rutledge*, this court did not analyze how serious the assault was, deciding that *Parratt* was preclusive of such inquiry. 660 F.2d at 1352. To the extent that *Rutledge* found *Parratt* to bar § 1983 claims for substantive rights violated by official assaults, it does not survive this court's en banc ruling in *Haygood v. Younger*, 769 F.2d at 1356.

The seriousness of the official misconduct may determine whether "the constitutional line" between a procedural and a substantive due process violation "has been crossed," so that the availability of state court relief will not bar a § 1983 claim. Clearly, the line is crossed in instances of serious police brutality. *See, e.g., Rutherford,* 780 F.2d at 1448. But *Rutherford* only "[p]artially answer[ed] the question left open in *Haygood*" as to whether "official assaults, batteries or other invasions of personal liberty" amount to substantive due process violations. *Id.* While brutality by police or prison guards is one paradigmatic example of a substantive due process violation, it does not exhaust the possibilities.

[6] More generally, substantive due process violations comprise those acts by the state that are prohibited "regardless of the fairness of the procedures used to implement them." *Daniels,* 474 U.S. at 331. In the prison setting at least, a substantive due process violation may arise from established procedures that create an unreasonable risk of harm. *Hudson v. Palmer,* 468 U.S. at 541 n.4 (Stevens, J., concurring in part). Although Ostrander did not himself assault Wood, he allegedly acted in callous disregard for Wood's physical security, a liberty interest. *See Ingraham v. Wright, supra.* In addition, Ostrander acted within a vacuum of unguided discretion because no state policy existed for instructing officers how to deal with third parties stranded as a result of an arrest. Thus, the state's "established [non]procedure" may have created an unreasonable risk to Wood. Wood has presented a triable issue of fact as to whether the deprivation here falls into the category of "other invasions of personal liberty." *Haygood v. Younger,* 769 F.2d at 1356.

[7] Ostrander arrested the driver and impounded the car in which Wood was a passenger, leaving her stranded alone in a high-crime area; Wood has raised a factual dispute as to whether Ostrander made any inquiry at all into her means of getting safely home. In our society, which is intensely aware of potential danger from street crime, it would not be an exag-

geration for a jury to find that Ostrander's alleged conduct "shocks the conscience," and thereby crosses the line into a deprivation of substantive due process. *See Rutherford*, 780 F.2d at 1446, 1447 (citing *Rochin v. California*, 342 U.S. 165, 172 (1952)).

II. *Qualified immunity*

State officials cannot be held liable for damages under § 1983 unless their conduct violates a clearly established constitutional right. *Davis v. Scherer*, 468 U.S. 183, 193 (1984). Officials are entitled to qualified immunity if their conduct is objectively reasonable "as measured by reference to clearly established law." *Id.* at 191 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). The district court found that the defendants were shielded by qualified immunity.[4] In reviewing the court's finding of qualified immunity, this court must determine both the legal contours of the constitutional deprivation, if any, that may be shown from the alleged facts in this case, and whether those legal contours were clearly established at the time of the incident.

A. *The law in 1984*

In *Capoeman v. Reed*, 754 F.2d 1512, 1514 (9th Cir. 1985), this court held that "in the absence of binding precedent, a court must look to whatever decisional law is available to ascertain whether the law is clearly established under the *Harlow* test." *Accord Bilbrey v. Brown*, 738 F.2d 1462, 1466 (9th Cir. 1984). The available decisional law includes cases

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[4]The district court found that the law was unclear both at the time, and at present, regarding a police officer's duty to protect members of the public from harm, even where a special relationship between the defendant and the victim exists. The court also attempted to distinguish away the central case relied on by plaintiffs by limiting it to its precise facts. These contentions, advanced by defendants on appeal, are addressed in the following sections.

from state courts, other circuits and district courts. *Ward v. San Diego Co.*, 791 F.2d 1329, 1332 (9th Cir. 1986).

The case most like our case is *White v. Rochford*, 592 F.2d 381 (7th Cir. 1979), which reversed the dismissal of a § 1983 complaint. In *White*, the defendant police officers arrested a driver for drag racing on the Chicago Skyway, a busy, limited-access highway. The complaint alleged that the driver, who was uncle to the three minor children riding with him in the car, pleaded with the officers to take the children to the station or a phone booth so that they could contact their parents. The officers refused, and instead left the children in the abandoned car on the roadside, in inclement weather. The court held that the alleged conduct stated a claim under § 1983. The officers "could not avoid knowing that, absent their assistance, the three children would be subject to exposure to cold weather and danger from traffic. *This indifference in the face of known dangers certainly must constitute gross negligence.*" 592 F.2d at 385 (emphasis added).

In dealing with *White*, decided five years before the incident in this case, defendants frame the immunity issue thus:

> In determining whether Ms. Wood was subjected to a constitutional deprivation it is the state of the law on September 23, 1984, which must be used to determine whether the violation occurred. . . .As of September 23, 1984, no court had ruled that a police officer owed a *constitutional* duty to make transportation arrangements for a non-intoxicated adult female who was left on the sidewalk of a major urban arterial within easy walking distance of at least two 24-hour businesses following the arrest of the person with whom she had previously been riding.

Appellee's Brief at 9 (citation omitted). Defendants seemingly suggest that this case can be disposed of if it does not bear a strict factual similarity to previous cases finding liabil-

ity. However, this crabbed view of the good faith immunity principle cannot withstand analysis. As the Supreme Court reaffirmed last term, it is not the case that "an official action is protected by official immunity unless the very action in question has previously been held unlawful, . . . but it is to say that in light of pre-existing law the unlawfulness must be apparent." *Anderson v. Creighton*, 107 S.Ct. 3034, 3039 (1987)(citations omitted); *see Mitchell v. Forsyth*, 472 U.S. 511, 535 n.12 (1985).

The first question is whether *White* is meaningfully distinguishable from the instant case. Both cases involve a police officer's roadside abandonment of non-arrested third parties. Defendants apparently would have the court decide that stranding three children on a busy eight-lane expressway is much worse than stranding a lone female in a high-crime area at 2:30 a.m., indeed so much worse that the former is a constitutional violation while the latter is not. It would seem that the Supreme Court's admonition in *Anderson* against looking for a repetition of "the very action in question" applies forcefully against making this type of comparison. Although the dangers facing the victims in the two cases may come from very different sources, the degree of danger is high in both, and the alleged police indifference to exposing the plaintiffs to the dangers is shocking in both instances. Defendants' suggestion that the children were in greater danger than Wood ("*certain danger* from the traffic and weather," Appellee's Brief at 10) is unpersuasive considering what actually occurred: none of the children was injured by a car (two suffered mental anguish, and a third suffered aggravation of his asthma condition from the weather), whereas Wood was raped.

Defendants also argue that *White* was merely a "plurality" opinion and, further, adopted an "*in loco parentis*" rationale, finding that the officers owed a special duty to the children. This argument mischaracterizes *White*. First, the opinion of the court and the concurrence agree on the basic rationale of

§ 1983 liability: "indifference [of the officers] in the face of known dangers," 592 F.2d at 381 (opinion of court), or "unnecessarily endangering *the innocent parties* in reckless disregard of their safety," *id.* at 388 (concurrence)(emphasis added). Nothing in either opinion suggests that the result would have been different had the abandoned person been an adult. Indeed, the phrase "*in loco parentis*" appears in the opinion only in the second half of a lengthy footnote setting forth an alternate rationale for liability. The court states that the officers could be liable under § 1983 for non-feasance in the face of an affirmative duty of police officers to protect peace, order and personal safety of others. 592 F.2d at 384 & n.6. The "*in loco parentis*" concept is introduced as *buttressing* the existence of a duty in that case, and not as the sole basis for that duty. *Id.*

[8] The immunity standard considers whether a reasonable law enforcement officer should view the *White* case as controlling. Given this element of reasonableness, the qualified immunity regime of clearly established law should not be held to allow § 1983 defendants to interpose lawyerly distinctions that defy common sense in order to distinguish away clearly established law. *White* holds that a police officer may be liable under § 1983 when he abandons passengers of arrested drivers thereby exposing them to unreasonable danger. It defies common sense to find a meaningful legal distinction between the dangers facing children crossing a busy highway and a woman left alone to fend for herself at 2:30 a.m. in a high-crime area. A reasonable police officer, whose job comprises an awareness of potential crime, would be aware of the potential danger facing a woman in Wood's circumstances.

B. *The precedential effect of* White *in this circuit*

The inquiry does not end here, however, because *White* did not necessarily establish law for this circuit. Where there are few cases on point, and none is binding, "an additional factor that may be considered in ascertaining whether the law is

clearly established is a determination of the likelihood that the Supreme Court or this circuit would have reached the same result" as the non-binding authorities at that time. *Capoeman*, 754 F.2d at 1515; *accord Ward*, 791 F.2d at 1332.

[9] The question is partially answered by *Escamilla v. Santa Ana*, 796 F.2d 266 (9th Cir. 1986), which relied on pre-1984 cases for the proposition that "state officers' inaction," including failing to perform a legally required act or showing deliberate indifference to a prisoner's safety, may be the basis for § 1983 claims. 796 F.2d at 268 (citing *Estelle v. Gamble*, 429 U.S. 97, 104 (1976), and *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978)). Although *Estelle* and *Johnson* are both prisoner cases, *Escamilla* involved the inaction of police officers in failing to protect a bystander. *Escamilla* dismissed the § 1983 claim, not because prisoner cases are *sui generis* and inherently distinguishable from police-and-bystander cases, but rather because in *Escamilla* there was no "custodial or other relationship obligating the police to protect the victim's safety." 796 F.2d at 269. However, *Escamilla* notes that such a relationship could arise between police and persons not in custody where "the state itself has put a person in danger." *Id.* The court relied for this proposition on another pre-1984 case, *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982)("If the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit."). Thus, the Ninth Circuit on July 31, 1986, based on pre-1984 cases, stated that police officers could be liable under § 1983 when, through inaction, they fail to protect a person they have put in danger. There is no reason to think that this court would have interpreted the same pre-1984 cases differently as of September 23, 1984.[5]

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[5]Post-occurrence decisional law supports this conclusion. *See Ketchum v. Alameda Co.*, 811 F.2d at 1247 (state official may incur duty to protect a person where "the state has affirmatively placed the plaintiff in a position of danger"); *Escamilla*, 796 F.2d at 269-70; *Jensen v. Conrad*, 747 F.2d 185, 193-94 (4th Cir. 1984).

We conclude that qualified immunity is unavailable to Ostrander.

C. *Triable issues of fact regarding liability*

Wood has raised a triable issue of fact as to whether Ostrander's conduct "affirmatively placed the plaintiff in a position of danger." *Ketchum,* 811 F.2d at 1247; *see Jackson v. City of Joliet,* 715 F.2d 1200, 1204 (7th Cir. 1983) (distinguishing situation where arrest creates the danger, actionable under § 1983, from situation where danger existed before defendant acted).

The state had made no "affirmative commitment" to protect the plaintiff, *see Escamilla,* 796 F.2d at 269-70, in that there was no state police policy at the time for dealing with stranded non-arrested third parties. But the lack of a policy can hardly count in defendants' favor. The fact that Ostrander arrested Bell, impounded his car, and apparently stranded Wood in a high-crime area at 2:30 a.m. distinguishes Wood from the general public and triggers a duty of the police to afford her some measure of peace and safety. *See White v. Rochford,* 592 F.2d at 384 & n.6 (and authorities cited therein). *See also Chambers-Costenes v. King Co.,* 100 Wn.2d 275, 669 P.2d 451 (1983); Plaintiffs' Opposition to Summary Judgment, Exhibits 1, 2(c)(policy of state police to respond to requests for assistance in courteous and judicious manner).

Finally, plaintiff has raised at least a triable issue (if not an undisputed one) regarding the state's knowledge of the danger: official crime reports show that the area where Wood was stranded had the highest violent crime rate in the County outside the City of Tacoma. Ostrander, a state trooper stationed in that area since 1981, may well be chargeable with constructive, if not actual, knowledge of that fact. Moreover, the inherent danger facing a woman left alone at night in an unsafe area is a matter of common sense. *Cf. White v. Rochford, supra.*

Most of the factual disputes in this case go to the issue of danger. Defendants contend, and the trial court found, that a 24-hour Shell and a 24-hour Seven-Eleven were located within two blocks of the location of the stop. Defendants further contend that there were paved sidewalks. Even if there is no genuine factual dispute as to these, their relevance is open to question by the trier of fact. The district court and the defendants too readily assume that Wood's travail would have been over if she had only gone to the Shell station or the Seven-Eleven. It is for the trier of fact to determine whether a reasonable person should have regarded a gas station or convenience store, located in a high crime neighborhood, as some kind of safe haven where she would have been given assistance or permitted to stay until daybreak before walking five miles home. Nor is a telephone much help to a person who allegedly has no money to place a call and no one to call. These factual assumptions, either expressly or impliedly made, are particularly inappropriate for the district court to make on summary judgment.

Other facts relevant to the safety issue are unresolvable on this record. It is unclear whether Wood had any money to make a phone call, whether there was anyone who could have helped her if she had been able to call them, and whether Wood acted unreasonably by accepting a ride with an unknown man.

There is a factual dispute as to whether Ostrander made any inquiry at all as to Wood's ability to get safely home, or whether, instead, he ignored her request for help. Certain evidence suggests that Ostrander untruthfully told his superiors that he was told that Wood was being picked up by some "friends," (Exhibit 4 to Plaintiff's Summary Judgment Opposition), and it is disputed whether Ostrander saw Wood picked up at all.

CONCLUSION

In sum, plaintiff has raised a genuine factual dispute regarding whether Ostrander acted with gross negligence,

recklessness, or deliberate indifference to Wood's safety by affirmatively placing her in danger. Ostrander is not entitled to the defense of qualified immunity. Accordingly, the grant of summary judgment for the defendant is REVERSED.

CARROLL, District Judge, Dissenting:

I would affirm the district court's order granting summary judgment in defendants' favor dismissing the amended complaint.

The district judge thoughtfully considered in his eight page order granting defendants' motion for summary judgment issues respecting whether the undisputed facts demonstrated "a violation of a constitutional right," and if so, whether the claim "should be dismissed on the basis that Ostrander is entitled to a good faith immunity." (ER 54, p. 3.)

In going through its analyses, the trial court found that the following facts, amongst others, were undisputed:

> The area in which the stop occurred was well lit. It was a clear night. There was a 24-hour Shell station located two blocks north of the area in which the stop occurred. There was a 24-hour 7-Eleven store located one-half block south of the area in which the stop occurred. Wood denies seeing any open businesses. Wood took a ride with a stranger and was raped.

Appellant has not challenged this finding as an issue on appeal. Ms. Wood's affidavit that she did not see these businesses does not create a genuine issue of fact as to their presence considering there were appropriate affidavits that businesses were present and open at the time in question. *Anderson v. Liberty Lobby, Inc.*, _ U.S. _, 106 S.Ct. 2505

(1986). Appellant's efforts to obliquely create a factual issue through argument is inappropriate and violative of the rules of this Court. When pressed on this proposition at oral argument, appellant's counsel took the position that the presence of these businesses near the arrest scene was irrelevant for summary judgment purposes.

The Majority Opinion does a disservice to the record when it infers several times that the character of the specific site where Ostrander left Ms. Wood was the epicenter of a high crime area and that there was a factual dispute whether it was lighted and in close proximity of two 24-hour business establishments.

I believe that the district court properly determined that a "special relationship" was not created under the circumstances present on the early morning hours of September 23, 1984 and further, that Ostrander was entitled to qualified immunity:

> . . . Wood was an adult female, admittedly able to exercise the independent judgment of an ordinary adult. She was left within walking distance of two open businesses where she could seek help. In this case the State had not affirmatively committed itself to protecting this class of persons. The state at the time of the indictment had no guidelines requiring the safekeeping of passengers of arrestees. In this case, it cannot be said that the state knew of Wood's plight. This is not the type of case where the state had knowledge of a particular madman who was likely to prey on Wood. The plaintiff alleges that this particular area is a high-crime area. To hold that the trooper had a duty of protection on that basis would be to create an affirmative constitutional duty of protection, in essence, to the public as a whole. This court declines to do so. Ostrander was unaware of whether or not she had money available to seek help.

> Thus, even assuming that an officer in 1984, through some crystal ball analysis, could foresee the analytical approach suggested by the Ninth Circuit in 1986, a special relationship was not created. At the time of the incident Ostrander's conduct did not violate a clearly established constitutional right. Ostrander is entitled to qualified immunity from suit for civil damages. (ER 54, p. 9.)

The district court was charitable in opining that a crystal ball might enable a police officer in 1984 to conclude what any panel of the Ninth Circuit would do when confronted with a claim such as this. In point of fact, it would place such officer in a mandatory position of a wise and all knowing prognosticator. Clearly an untenable expectation under the pronouncements of this Court and the United States Supreme Court.

—

A reading of the three separate opinions of the panel in *White v. Rochford,* 592 F.2d 381 (7th Cir. 1979), discloses the importance of the plaintiffs' status as children *and* the characteristics of the area where they were abandoned to the finding by two judges of a "special relationship." The prefatory statement in Judge Sprecher's opinion makes this evident:

> The issue presented by this case is whether police officers may, with constitutional impunity, abandon children and leave them in health-endangering situations after having arrested their custodian and thereby depriving them of adult protection. We hold that they may not, and accordingly, we reverse the district court's dismissal of a complaint alleging such facts and remand for trial.

Id., p. 382.

This same theme was expressed in the concurring opinion:

> In the cased at bar the children in the car had a federally protected right to be free from unjustified intrusions on their personal security by the police. Their personal security was under the protection of their uncle. If that protection was removed and no alternative protection was provided, they would be exposed to danger as occupants of an immobilized car on a highspeed expressway and to the cold. Arresting the uncle and thus removing their protection and yet leaving the children exposed to these hazards was an unjustifiable intrusion on the children's personal security.

Id., p. 387.

A far different set of circumstances faced Ms. Wood and Officer Ostrander when they parted company. I believe that the clear holding of *White* (and the few cases that cite it) is that an entirely different result would have obtained had the abandoned persons in *White* been adults, and the area at issue a lighted street close to two business establishments. To conclude otherwise is to extend the protections of the Civil Rights Act of 1871, and the United States Constitution, to a full panoply of state tort claims against law officers, a consequence never before proposed by any other federal appellate Court.

I commend Judge John F. Kilkenny's dissenting opinion (Senior Ninth Circuit Judge, sitting by designation) in *White* to those interested in an extended analysis of why it was that the judgment of the lower court in *White*, dismissing that action, should have been affirmed and why it is that a police officer in 1984 could not reasonably have known of the *White* case, let alone guess its impact on the situation he faced.

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

NO. C85-1317MTB

LINDA K. WOOD,

Plaintiff,

vs.

STEVEN C. OSTRANDER , et al.,

Defendants.

ORDER OF DISMISSAL

THIS MATTER comes before the Court on Defendants' Second Motion for Summary Judgment for an Order of Dismissal. The Court has reviewed the Motion, the memoranda of counsel and the records and files herein and rules as follows:

The grant of summary judgment is appropriate if it appears, after viewing the evidence in the light most favorable to the opposing party, that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Lew v. Kona Hospital*, 765 F.2d 1420, 1423 (9th Cir. 1985). In reviewing the affidavits and deposition excerpts of the parties from both the first motion for summary judgment and the present motion, the following facts are undisputed.

The plaintiff, Linda Wood (Wood), and her boyfriend, Robert Bell (Bell), spent the evening of September 22, 1984 together. At about 2:30 a.m. the next morning as they were driving home, Trooper Ostrander (Ostrander) stopped the Bell automobile near 136th and Pacific. Bell was arrested for "driving while intoxicated," placed in the officer's patrol car

and was taken from the scene. The automobile which Bell was driving was registered to Juanita Bennett. Since Bell refused to sign a waiver of impoundment for the car, Ostrander made arrangements to have the car impounded.

After placing Bell in the patrol car, Ostrander returned to the automobile Bell had been driving, asked Wood to step out of the car and removed the keys. Although Wood admitted to having consumed five or six beers over the course of the evening (8:30 p.m. to 2:30 a.m.), she maintains she was not "drunk." There is no evidence in the record presented that her level of intoxication was such that she could not exercise the independent judgment of an ordinary adult.

The area in which the stop occurred was well lit. It was a clear night. There was a 24-hour Shell station located two blocks north of the area in which the stop occurred. There was a 24-hour 7-Eleven store located one-half block south of the area in which the stop occurred. Wood denies seeing any open businesses. Wood took a ride with a stranger and was raped.

The parties dispute other circumstances and occurrences that evening. The parties dispute whether Ostrander volunteered to call a friend or family member to come and give Wood a ride home. The parties dispute whether or not it was a cold or mild evening. While Wood claims she was left on the side of the road five miles from her home without money for a cab or bus, there is no showing that Ostrander was made aware of those facts.

In this motion the defendants assert:

1. This cause of action should be dismissed on the basis that Ostrander is entitled to good faith and immunity;

2. In light of the additional undisputed facts provided, the Court should reconsider its earlier order and dismiss this cause of action on the basis that the plaintiff has failed to state a claim cognizable under 42 U.S.C. 1983. She has not alleged a violation of a constitution right.[1]

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[1]In defendants' first motion for summary judgment they asserted that Ostrander's actions were at most negligent acts not actionable under the Civil Rights Act. Based on the facts then presented and the disputed facts, this Court declined to characterize Ostrander's actions as mere negligence.

3. The cause of action against Neil Maloney should be dismissed on the basis of the Eleventh Amendment and on the basis that an action based on *respondent superior* does not lie under 42 U.S.C. 1983;

4. The claim for damages arising as a result of an intervening criminal act, the rape, should be dismissed.

This court will first address defendant's claim of qualified immunity.

Qualified Immunity.

The defendants claim they are immune from liability for civil damages on the basis of qualified or good faith immunity. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). A law enforcement officer is immune from liability for civil damages as long as his conduct does not violate a clearly established constitutional right at the time that the conduct occurred. *Davis v. Scherer*, 468 U.S. 183 (1984).

The defendants assert, assuming *arguendo* that the court could find that Ostrander's conduct violated Wood's constitutional rights, that he is immune from liability for civil damages as long as his conduct did not violate **clearly established** constitutional right of which a reasonable person would have known in September 1984, the time that the conduct occurred. This court then must determine whether on September 1984, the time of the incident, Ostrander had a clearly established constitutional duty to provide protection and/or safekeeping for Wood under the circumstances. In making that determination the court must look to binding precedent, other decisional law available and, if still unclear, whether the Supreme Court or this circuit would have reached the results as those courts which had previously considered the issue. *Capoeman v. Reed*, 754 F.2d 1512 (9th Cir. 1985).

As a general rule, the circuits have held that there is no constitutional right to be protected by the state from criminals or madmen. Because there is no constitutional duty of the state to provide such protection, its failure to do so is not actionable under 42 U.S.C. 1983. *Bowers v. DeVito*, 686 F.2d 616 (7th Cir. 1982). As the court explained in *Bowers v. DeVito, supra*, at 618

> The Constitution is a charter of negative liberties; it tells the state to let people alone; it does not require the federal government or the state to provide services, even so elementary a service as maintaining law and order. * * * and as the State of Illinois has no federal constitutional duty to provide such protection, its failure to do so is not actionable under Section 1983.

The one qualification to that rule is that such a constitutional right or corollary duty may arise out of a special custodial or other relationship created or assumed by the state in respect of a particular person. *Fox v. Custis*, 712 F.2d 84 (4th Cir. 1983). This right to protection originally arose and was originally limited to cases where the state assumed the duty when a person was placed in the state's custody.

> Thus, as of 1980, affirmative duty and constitutional rights had found a common ground in this circuit only in the prision setting. The government's duty to protect applied only to those "incarcerated" by the state, for only those individuals could be subject to an eighth amendment violation.
>
> *Jensen v. Conrad*, 747 F.2d 185 at 191 (4th Cir. 1984).

Typical examples: *Withers v. Lavine*, 615 F.2d 158 (4th Cir. 1980), *cert. denied*, 449 U.S. 849 (1980) (prison inmates under known risk of harm from homosexual assaults by other inmates); *Stokes v. Del Cambre*, 712 F.2d 1120 (5th Cir. 1983) (jailers owe constitutional duty to protect prisioners against harm from other prisoners); *Doe v. New York City Dept. of Social Services*, 649 F.2d 134 (2d Cir. 1981) (due process duty to a foster child to supervise her placement in a foster home where she was abused).[2]

The "other special relationship" which may give rise to a constitutional right to protection outside the custodial context was less clear at the time of the incident.

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[2]Note that the earlier decisions involving claims of state officials' failure to protect in the custodial context, to the extent that they rely on *Parratt's* holding that negligence is actionable under 42 U.S.C. 1983, rest on an obsolete doctrine. *Escamille v. City of Santa Anna*, 796 F.2d 266 (9th Cir. 1986). Footnote 1. *See also, Hearst v. Gertzen*, 676 F.2d 1252 at 1263 (9th Cir. 1982).

> The current debate over affirmative duty and constitutional tort stems in large part from a prisoner petition case decided by the Supreme Court in 1976.
>
> *Jensen v. Conrad, supra*, at 190.
>
> The contours of what constitutes a "special relationship" between a municipality, acting through its officials, and its citizens are hazy and indistinct.
>
> *Ellsworth v. City Racine*, 774 F.2d 182 (7th Cir. 1985).
>
> Thus we cannot hold that, as a matter of law, the agency had no duty to Aleta, but we will also, as did the other Courts of Appeals, eschew any comprehensive limning of the parameters of the "special relationship" that suffices to place on an agency an affirmative obligation to persons not in custody.
>
> *Estate of Bailey by Oare v. County of York*, 768 F.2d 503 (3d Cir. 1985).

Moreover, the courts even today have reached diverse results in factually similar circumstances in determining what constitutes a special relationship. This was made obvious by counsels' citations. Plaintiff cited *White v. Rockford*, 592 F.2d 381 (7th Cir. 1979) for the proposition that a special relationship may arise in specific circumstances where an officer arrested an uncle leaving four minor children stranded in a car on a freeway. In the court's analysis the trooper had removed the protection the uncle afforded the children and thus stood in *loco parentis* and assumed the duty of protection. In *Moore v. Marketplace*, 754 F.2d 1336 (7th Cir. 1985), cited by the Defendants, the law enforcement officer's conduct in leaving an arrestee's minor daughter alone in a camper-trailer at a campground in the middle of the night causing her to be place in great fear for her safety as a result of her parents' being arrested, was described as "the exercise of extremely poor judgment" but did not rise to a level of a constitutional deprivation which would support a claim under 42 U.S.C. 1983.

The courts also vary in their approach in analyzing various factual situations. *White v. Rockford, supra*, focused on the egregiousness of the fact pattern and the intrusion on the parent/child relationship. *Martinez v. California*, 444 U.S. 277 (1980). Yet other courts have focused on the lack of duty. *Wright v. City of Ozarke*, 715 F.2d 1513 (11th Cir. 1983). Thus, the law is unclear as to the circumstances that would give rise to a special relationship creating the constitutional right to protection cognizable under 42 U.S.C. 1983 at the time of this incident (October 1984). The law was also unclear on the analysis to be used in defining the parameters of that duty at the time of the incident.

Post-incident cases have given some guidance as to the appropriate analytical approach. In *Escamille v. City of Santa Ana*, 796 F.2d 266 (9th Cir. 1986) the court adopted the approach suggested in Footnote 11 of *Jensen v. Conrad, supra*, at 194.

> Although we find no need to provide a comprehensive definition of "special relationship" given the facts of these cases, we note that these cases underscore some of the factors that should be included in a "special relationship" analysis. These factors — which would make these cases particularly close ones were we to decide them — include:
>
> > 1) Whether the victim or the perpetrator was in legal custody at the time of the incident, or had been in legal custody prior to the incident.
> >
> > * * *
> >
> > 2) Whether the state has expressly stated its desire to provide affirmative protection to a particular class or specific individuals.
> >
> > * * *
> >
> > 3) Whether the State knew of the claimants' plight.

To apply this analysis to this case: Wood was not in Ostrander's custody. Nor, under the circumstances, could the court

assume constructive custody as the court did in *White v. Rockford*, the *in loco parentis* doctrine. Wood was an adult female, admittedly able to exercise the independent judgment of an ordinary adult. She was left within walking distance of two open businesses where she could seek help. In this case the State had not affirmatively committed itself to protecting this class of persons. The state at the time of the incident had no guidelines requiring the safekeeping of passengers of arrestees. In this case it cannot be said that the state knew of Wood's plight. This is not the type of case where the state had knowledge of a particular madman who was likely to prey on Wood. The plaintiff alleges that this particular area is a high-crime area. To hold that the trooper had a duty of protection on that basis would be to create an affirmative constitutional duty of protection, in essence, to the public as a whole. This court declines to do so. Ostrander was unaware of whether or not she had money available to seek help. Thus, even assuming that an officer in 1984, through some crystal ball analysis, could foresee the analytical approach suggested by the Ninth Circuit in 1986, a special relationship was not created. At the time of the incident Ostrander's conduct did not violate a clearly established constitutional right. Ostrander is entitled to qualified immunity from suit for civil damages.

Since the cause of action against Neil Maloney, Ostrander's superior, is based on a theory of failure to train, supervise and control Ostrander, that claim must also fail. Further, since this court is granting Defendants' Motion for an Order of Dismissal on the basis of qualified immunity, it need not address defendants' alternate bases for summary judgment. Based on the foregoing opinion it is hereby

ORDERED the defendants' Motion to Dismiss this cause of action against the defendants is hereby **GRANTED.**

The Clerk of the Court is instructed to send uncertified copies of this Order to all counsel of record.

DATED this 24th day of April, 1987.

ss. _____

ROBERT J. BRYAN
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 87-3924

D.C. NO. CV-85-1317-T

LINDA K. WOOD,

Plaintiff-Appellant,

vs.

STEVEN C. OSTRANDER; NEIL MALONEY,

Defendants-Appellees.

Before: FLETCHER and THOMPSON, Circuit Judges, and CARROLL, District Judge*

ORDER

Appellant's motion to strike materials submitted by appellees, and for sanctions, filed July 14, 1989 is denied.

The panel as constituted above has considered the appellees' petition for rehearing, and a majority of the judges on the panel has voted to deny the petition.

The full court has been advised on the suggestion for rehearing en banc, and a majority of the active judges of the court has failed to vote for en banc rehearing. Fed. R. App. P. 35(a).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

*Honorable Earl H. Carroll, United States District Judge for the District of Arizona, sitting by designation.

APPENDIX E

AMENDMENT 14

Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX F

42 USC § 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United State or other person within the jurisdiction thereof to the deprivation of any rights, privleges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

APPENDIX G

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

NO. C851317T

LINDA K. WOOD,

Plaintiff,

vs.

STEVEN C. OSTRANDER, individually and as an Officer of the Washington State Patrol, and "JANE DOE" OSTRANDER, his wife; and NEIL MALONEY, individually and as Chief of the Washington State Patrol, and "JANE DOE" MALONEY, his wife,

Defendants.

COMPLAINT

COMES NOW the Plaintiff, Linda Wood, and alleges and complains of Defendants as follows:

I.

This action involves a question of federal law. Jurisdiction is vested in this Court by virtue of 28 USC §1331. The subject federal law is 42 USC §1983.

II.

That at all times relevant hereto the Plaintiff herein was a resident of Pierce County, Washington.

III.

That all acts alleged herein took place in Tacoma, Pierce County, Washington.

IV.

Defendant Steven C. Ostrander is and was at all times relevant hereto, an Officer of the Washington State Patrol. He is sued individually and in his official capacity. Defendant Neil Maloney is and was at all times relevant hereto, Chief Officer of the Washington State Patrol. As such he was the commanding officer of Defendant Ostrander and was responsible for the training and conduct of said Defendant. He is sued individually and in his official capacity. All acts of the individual Defendants were done for the benefit of their marital community.

At all times relevant hereto and in all their actions described herein, the Defendants Ostrander and Maloney, were acting under color of law and under color of their positions as Police Officer and Chief of the Washington State Patrol.

V.

On September 23, 1984, at about 2:45 a.m. thereon, Plaintiff was assaulted and raped following a traffic arrest. The scene began out on Pacific Avenue at South 136th Street.

VI.

Plaintiff was a passenger in an automobile driven by her boyfriend when the car was stopped by State Trooper Ostrander for having his car lights on high beam.

VII.

After verbal confrontation between the Trooper and the arrested boyfriend, the boyfriend lost the argument and was hauled off to jail. The Trooper took the car keys to Plaintiff's boyfriend's car, despite Plaintiff's requests for help. The Plaintiff was left abandoned on the side of the roadway as a result of the Trooper's negligence and total disregard for her safety.

VIII.

No public transportation was available. The roadway was dark and unprotected. After Plaintiff had refused three

offers by men who were passing by, Plaintiff finally and fearfully accepted a ride as she was five miles from her parents' home and it was cold and damp by the side of the highway.

IX.

The driver then drove off into a secluded area, attacked and raped the Plaintiff.

Plaintiff has since filed a claim with the State of Washington pursuant to RCW 4.92.100 et. seq.

WHEREFORE, Plaintiff prays for judgment as follows:

1. General and special damages incurred by Plaintiff as the proximate result of the negligent and outrageous conduct of Defendant Steven C. Ostrander;

2. General and special damages incurred by Plaintiff as the proximate result of Neil Maloney's failure to properly train, supervise, and control the actions of his subordinate Steven C. Ostrander; and

3. General and special damages incurred as a result of the deprivation of Plaintiff's civil rights which occurred as a proximate result of behavior and activities of Steven C. Ostrander and Neil J. Maloney.

Such damages to be proven at the time of trial and include but are not limited to Plaintiff's physical and emotional trauma, costs, attorney's fees, and all costs of medical care, past, present and future.

DATED this 5th day of December, 1985.

ss._____

NEIL J. HOFF
Attorney for Plaintiff

STATE OF WASHINGTON
County of Pierce

LINDA K. WOOD, being first duly sworn on oath, deposes and says:

That I am the Plaintiff in the above-entitled matter. That I have read the within and foregoing Complaint, know the contents thereof, and believe the same to be true.

LINDA K. WOOD
Plaintiff

SUBSCRIBED AND SWORN to before me this 30th day of December, 1985.

NOTARY PUBLIC in and for the
State of Washington, residing in
Tacoma.